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REGULATION OF PRIVATE MILITARY COMPANIES IN IRAQ

by

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REGULATION OF PRIVATE MILITARY COMPANIES IN IRAQ

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ABSTRACT

This thesis examines problems that states face when using private military companies (PMCs) and possible solutions for solving those problems. The main argument of this thesis is that the problems and their solutions are not the same for all states. They change mainly because of the capability of state institutions such as the Ministry of Defense, national laws, and public armed forces. For that reason, the problems and solutions are examined from the aspect of two types of states: strong state and weak state. The use of private military companies in Iraq, which represents two types of states (the U.S. and Iraq), is the main case of this thesis.

The goal of this thesis is to answer the following questions: Which theory of civil military relations can be a guide for regulating PMCs from the aspects of control, effectiveness and efficiency? What are the main challenges of the U.S. as a strong state and of Iraq as a weak state? What are the motives and capabilities of the U.S. and Iraq to regulate PMCs? How can national regulations be supported at the international level?

In this context, principal agent theory and new institutionalism can explain the structure and current tensions of state-PMCs relations. The solutions for regulation mainly depend on the capabilities of national institutions, which affect the principal-agent relations between states and PMCs. Weak states, such as Iraq, are more vulnerable to the challenges PMCs cause than strong states such as the U.S. Moreover, weak states do not have sufficient capacity to solve the problems in the near future, except by putting limitations on foreign PMCs and operational functions. In contrast, strong states have the capacity for solving these problems. They need political will, however, to do so. Moreover, international regulation is an indispensable element for effective regulation over private military industry due to the industry's transnational feature.

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LIST OF ACRONYMS AND ABBREVIATIONS

CACI	California Analysis Center, Incorporated
CBO	Congressional Budget Office
CMR	Civil-Military Relations
COR	Contracting Officer Representative
CPA	Coalitional Provisional Authority
CRS	Congressional Research Service
DCMA	Defense Contract Management Agency
DFARS	Defense Federal Acquisition Regulation Supplement
DoD	Department of Defense
FAIR	Federal Activities Inventory Reform
FAR	Federal Acquisition Regulation
GAO	Government Accountability Office
GoI	Government of Iraq
ID/IQ	Indefinite Delivery/Indefinite Quantity
ISF	Iraqi Security Forces
ITAR	International Transfer of Arms Regulation
KBR	Kellogg, Brown and Root
LOGCAP	Logistics Civil Augmentation Program
MEJA	Military Extraterritorial Jurisdiction Act
MoD	Ministry of Defense
MoI	Ministry of Interior
MSP	Military Service Providers
MPRI	Military Professional Resources Incorporated
NCO	Non-Commissioned Officer
NGO	Non-Governmental Organization
NSP	Non-lethal Service Providers
OAU	Organization of African Unity
OMB	Office of Management and Budget

PMC	Private Military Company
PMF	Private Military Firm
PMI	Private Military Industry
PMSC	Private Military/Security Company
PSC	Private Security Company
PSCAI	Private Security Company Association of Iraq
QDR	Quadrennial Defense Review
SIGIR	Special Inspector General for Iraq Reconstruction
SMTJ	Special Maritime and Territorial Jurisdiction
UCMJ	Uniform Code of Military Justice
UNPK	United Nations Peacekeeping
USAID	United States Agency and International Development

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I. INTRODUCTION

A. DEFINITION AND CLASSIFICATIONS

1. Definition

In the literature, there is no clear definition of private military companies (PMCs). Even in international legal documents, there are almost no definitions of PMCs. In summer 2009, an international attempt to draft a convention on defining and regulating PMCs was made by a working group in the United Nations Commission on Human Rights.¹ According to the draft convention, “A Private Military and/or Security Company (PMSC) is a corporate entity which provides on a compensatory basis military and/or security services, including investigation services, by physical persons and/or legal entities.”²

On the other hand, opponents of using PMCs call them mercenaries. However, the discussion about whether PMCs are mercenaries or legal entities will likely continue due to the absence of clear and unanimous definitions of both mercenaries and PMCs.

The dictionary meaning of mercenary is one who “serves merely for wages; especially, a soldier hired into foreign service.”³ The only definition of mercenaries in international law is in Article 47 of Additional Protocol to Geneva Conventions. It states”

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) Is specially recruited locally or abroad in order to fight in an armed conflict;

¹ Jennifer K. Elsea, “Private Security Contractors in Iraq and Afghanistan: Legal Issues,” *Congressional Research Service*, December 22, 2009, 8, available at <http://www.fas.org/sgp/crs/natsec/R40991.pdf> (accessed January 17, 2010).

² Office of the United Nations High Commissioner for Human Rights, “Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies,” Final draft for distribution, July 13, 2009, 6 available at <http://www.mgimo.ru/files/121626/draft.pdf> (accessed January 22, 2010).

³ Merriam-Webster’s Online Dictionary.

- (b) Does, in fact, take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) Is not a member of the armed forces of a Party to the conflict; and
- (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.⁴

The definition is so narrow that modern private military contractors cannot be called mercenaries using this definition. In the third chapter, this legal definition of mercenaries will be discussed in detail. As for the academic literature, there is no unanimous definition of mercenaries. Newell and Sheehy stated that “it is clear that it at least includes a person who is foreign to a conflict participating in combat with the aim of securing personal gain.”⁵ Singer presents a similar definition of mercenaries. Also, in order to differentiate PMCs from mercenary units, he says that “mercenary units are temporary and ad hoc groupings of individual soldiers.”⁶ Contrary to these definitions, others include all military activities that are performed by PMCs, as a definition of mercenaries. For example, Nathan says that “By mercenaries I mean soldiers hired by a foreign government or rebel movement to contribute to the prosecution of armed conflict—whether directly by engaging in hostilities, or indirectly through training, logistics, intelligence or advisory services—and who do so outside the authority of the government and defense force of their own country.”⁷ The important point in Nathan’s definition

⁴ Protocol Addition to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Part 3, Article 47, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> (accessed July 26, 2009).

⁵ Virginia Newell and Benedict Sheehy, “Corporate Militaries and States: Actors, Interactions, and Reactions,” *Texas International Law Journal* 41, no. 1 (Winter 2006), 71.

⁶ Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (London: Cornell University Press, 2003), 43.

⁷ Laurie Nathan, “Lethal Weapons: Why Africa Needs Alternatives to Hired Guns,” *Track Two* 6, no. 2 (1997), 10, <http://ccrweb.ccr.uct.ac.za/archive/two/3/p10.html> (accessed August 2, 2009).

concerns acting without authority from a home state; PMCs are mercenaries. Another definition by Goddard is, “An individual or organization financed to act for a foreign entity within a military style framework (including conduct of military-style operations) without regard for ideals, legal or moral commitments, and domestic and international law.”⁸ In addition to covering all military tasks, Goddard’s definition includes not only individuals, but organizations, as well.

2. Classifications of Private Military Companies

Due to the absence of a clear and unanimous definition of PMCs, scholars have been using many different terms to refer to them; Private Military Companies (PMC), Private Security Companies (PSC), Private Military Firms (PMF), Military Service Providers (MSP), Mercenary Companies, Private Military/Security Contractors, etc. Moreover, the term of military/security contractors has been used to refer both to companies and to individual employees. The use of different terms for the same subject and the use of the same term for different subjects creates confusion in the literature. Moreover, besides the inconsistent use of terms, classification of private military industry is another unclear issue in the literature.

There are different classifications of private military industry in the literature. The first classification was made by a British “Green Paper.” It classifies the industry according to the services provided; a) combat and operational support, b) military advice and training, c) arms procurement, d) intelligence gathering, e) security and crime investigation, and f) logistical support.⁹

Doug Brooks, the president of the International Peace Operations Association, makes another classification in response to the “Green Paper.” He says that a simpler

⁸ S. Goddard, “The Private Military Company: A Legitimate International Entity within Modern Conflict,” Master’s Thesis, (Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, 2001), 8.

⁹ United Kingdom Foreign and Commonwealth Office, “Private Military Companies: Options for Regulation,” London: The Stationary Office, HC 577, February 12, 2002, 10, available at http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_privatemilitarycompanies (accessed May 11, 2009).

classification is needed for the purpose of regulation.¹⁰ He calls the industry Military Service Providers (MSPs) and divides it into three categories; a) Nonlethal Service Providers (NSPs), b) Private Security Companies (PSCs), and c) Private Military Companies (PMCs).¹¹ He further defines specific functions in the categories as:¹²

- (1) NSP: Mine Clearance, Logistics and Supply, Risk Consulting.
- (2) PSC: Industrial Site Protection, Embassy Protection, Humanitarian Aid Protection.
- (3) PMC: Military Training, Military Intelligence, Offensive Combat.

The third classification is provided by Peter Singer who names the companies generally as Private Military Firms (PMFs) and classifies them into three categories. These categories are: a) military provider firms (implementation and command), b) military consultant firms (advisory and training) and c) military support firms (nonlethal aid and assistance).¹³ In his classification, he uses the “Tip of the Spear” metaphor, which he thinks is a useful analogy from the military perspective.¹⁴ The main characteristic of this classification is that it focuses on the location of the services in a battlefield and the impact of companies on the operations.

The next classification is Deborah Avant’s, which was developed as a response to Singer’s classification. She also uses the “Tip of the Spear” metaphor, but she classifies contracts rather than firms.¹⁵ Pointing to Singer’s classification, she says, “While the distinction between service types makes sense, the same PSC may provide type-one services in one contract and type-three in another....Thus I use contracts rather than firms

¹⁰ Doug Brooks, “Protecting People: the PMC Potential,” a working document presented as Comments and Suggestions for the UK Green Paper on Regulating Private Military Services, July 25, 2002, 2. available at <http://www.hoosier84.com/0725brookspmcregs.pdf> (accessed June 26, 2009).

¹¹ Brooks, “Protecting People: the PMC Potential,” 2.

¹² Ibid.

¹³ Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, 93.

¹⁴ Ibid., 91.

¹⁵ Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security*, (N.Y.: Cambridge University Press, 2005), 17.

as the unit of analysis.”¹⁶ Moreover, she also classifies the services into two parts as police and military functions. The categories of her classification from the “tip” to the “end” of the spear are:

- (1) Military Functions - armed operational support, unarmed operational support on the battlefield, unarmed military advice and training, and logistical support.
- (2) Police Functions - armed site security, unarmed site security, police advice and training, crime prevention and intelligence.¹⁷

The last classification belongs to Nicholas Dew and Bryan Hudgens. In their report, they examined Singer’s and Avant’s classifications. They present a new classification that is more comprehensive than Singer’s and Avant’s.¹⁸ The key difference in their classification is the use of the capabilities of individual PMCs as the base factor. They argue that “an analysis of what tasks firms have been performing over time does not capture firms’ potential movement around the spear. There is an even broader scope of latent activity.”¹⁹ They present three main categories for capabilities of PMCs;

- (1) Operations: attack operations, protection services,
- (2) Advisory & Training: advisory, training,
- (3) Support Services: In this category, they presented a lot of sub-categories ranging from tactical equipment maintenance and operation to admin services.

In this research, I will use the classification of Dew and Hudgens because of its simple and comprehensive nature. In regard to first category, I will use the term “operational military functions (services)” for attack operations in order to include defensive military operations that are different from protective services.

¹⁶ Avant, *The Market for Force: The Consequences of Privatizing Security*, 17.

¹⁷ Ibid.

¹⁸ Nicholas Dew and Bryan Hudgens, “The Evolving Private Military Sector: A Survey,” Acquisition Research Sponsored Report Series, NPS-AM-08-012, prepared for Naval Postgraduate School, August 11, 2008, 18, available at http://acquisitionresearch.net/_files/FY2008/NPS-AM-08-012.pdf (accessed August 19, 2009).

¹⁹ Ibid., 17.

In regard to companies, I will use Private Military Companies (PMCs) to refer to the companies that fulfill at least one military or police function in the range of logistical support to operational services. I will use the term Private Security Companies (PSCs), which are also of PMCs, to refer to companies who perform only armed and/or unarmed protection services. In order to refer to employees of PMCs, I will use the terms “private military employees” or “individual contractors.” And to mention the industry as a whole, I will use the term “Private Military Industry” (PMI).

B. BRIEF HISTORY AND THE RISE OF PRIVATE MILITARY COMPANIES

The use of mercenaries is as old as war. According to Singer, “The first official historic reference is of mercenaries who served in the army of King Shulgi of Ur (ca. 2094-2047 B.C.E).”²⁰ But, “the battle of Kadesh (1294 BCE) is the first great battle in history of which we have any detailed information [about use of mercenaries].”²¹ Moreover, in a Persian civil war (in 401–400 B.C.E), Greek soldiers who were called “Ten Thousands” were hired to fight.²² In the next period, the Carthaginian Empire was highly dependent on mercenaries in the First Punic War (264–241 B.C.E) and the Second Punic War (218–202 B.C.E). In this period, one of the important characteristics of Rome was having a citizen army. However, it relied on mercenary armies, too.²³ Moreover, in different time periods, mercenaries were used by other states such as Egypt and the Byzantine Empire.²⁴ As for the Middle Ages, Mercenaries continued to be an integral part of medieval armies. European Armies, especially Italian city states, heavily relied on hired soldiers in the condotta (contract) system.²⁵

²⁰ Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, 20.

²¹ Ibid.

²² Ibid., 21.

²³ Ibid.

²⁴ Ibid., 20–22.

²⁵ Ibid., 22.

According to Singer, even though the first mercenaries were seen in ancient times, the first military companies were seen in the Hundred Years War period (1337–1453).²⁶ He also points out that PMCs usually arise in situations in which political order and stability are absent, especially in past periods of war.²⁷ Singer explains the logic of the proliferation of PMCs by stating:

The absence of centralized control created a situation optimal for the private soldier. While originally many soldiers hired themselves out as “free lances” (the origin of the modern business term), sooner or later the money ran out or that phase of the war came to an end. In either case, the soldiers were left without employment. Having no homes or careers to return to, many of these soldiers formed “Companies” (derived from “con pane,” designating the bread that members received). These were organizations designed to facilitate their employment as a group or, at the very least, provide one another sustenance and protection. They would travel together in search of work, usually in the form of new campaigns to fight, and support themselves along the way by blackmailing towns and villages.²⁸

The recent rise of the industry occurred again in the unstable situation that emerged after the end of the Cold War. As stated by Turcan and Ozpinar, “after the end of the bipolar international system, a stable order in which nation-states were the premier players and their interests were the fundamental determiners of their behaviors, a power vacuum emerged in many problematic regions.”²⁹ And, as noted by Schreier and Caparini, “the end of the bipolar confrontation led to diminished great power interests in these [problematic] areas.”³⁰ Moreover, as emphasized by Isenberg, “the end of the Cold War gave states a reason to downsize their military forces, freeing up millions of former

²⁶ Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, 23.

²⁷ Ibid.

²⁸ Ibid., 24.

²⁹ Metin Turcan and Nihat Ozpinar, “‘Who Let the Dogs Out?’: A Critique of the Security for Hire Option in Weak States,” *Dynamics of Asymmetric Conflict*, First Published on January 18, 2010, 4, available at <http://www.informaworld.com/smpp/content~db=all?content=10.1080/17467580903532068> (accessed January 19, 2010).

³⁰ Fred Schreier and Marina Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” paper presented as part of the policy dialogue on issues pertaining to the core mission of Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, March 2005, Occasional Paper No: 6, 3.

military personnel from a wide variety of countries, many of them Western.”³¹ Schreier and Caparini estimate the numbers of those military personnel, who found themselves unemployed, as seven million.³²

Thus, skilled personnel as employees and unstable states as potential clients were available for a private military industry (PMI). As a result, PMCs filled the gap caused by the end of the Cold War. According to Avant, private military or security companies were used extensively by states, international organizations, global corporations, NGOs and individuals since the end of the Cold War.³³ Avant stated that “every multi –lateral peace operation conducted by the UN since 1990 included the presence of PSCs.”³⁴ Moreover, she adds that the states that outsourced military services ranged from strong capable states like the U.S. to weak states such as Sierra Leone. Furthermore, Avant used financial data in order to show the rapid proliferation of the PMI. She argued that annual revenues of the industry increased from \$55.6 billion dollars in 1990 to over \$100 billion in 2003. And it would be about \$200 billion dollars in 2010 according to the financial estimates of the industry.³⁵

C. RESEARCH QUESTIONS AND THE IMPORTANCE OF THE RESEARCH

1. Major Research Questions

PMCs have been hired for different purposes by different states, particularly by the United States. As stated above, after the Cold War, the number of PMCs has increased. While the ratio of contractor personnel to military personnel in the Gulf War was 1 to 55, in Operation Iraqi Freedom in 2003, it was about 1 to 1.³⁶ Because of their

³¹ David Isenberg, “A Government In Search of Cover: PMCs in Iraq,” paper presented as part of the conference Market Forces: Regulating Private Military Companies, for British American Security Information Council, at New York University School of Law, New York, 23–24 March 2006, 3.

³² Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 4.

³³ Avant, *The Market for Force: The Consequences of Privatizing Security*, 7.

³⁴ Ibid.

³⁵ Ibid., 8.

³⁶ Congressional Budget Office, “Contractors’ Support of U.S. Operations in Iraq,” prepared at the request of the Senate Committee on the Budget, August 2008, 13.

intense use in Iraq by coalition forces, some problems about their legal status, contracting process, control and oversight have emerged. These problems require national solutions as well as effective support from the international level.

Furthermore, the types and levels of dangers that states face are not same. Incapable or failed states, such as Iraq, are more vulnerable than capable or strong states, such as the U.S. Thus, at the national level the priorities and approaches of states must be different. Moreover, international regulation must be established in order to reinforce national regulations because of the transnational nature of the PMI.

Based on these facts, my research question is, “What are the motives and capabilities of Iraq and the U.S. to regulate PMCs? And how can they be supported at the international level?”

2. Importance of the Research

Although the PMI is not a new phenomenon, it has been strengthened by Operation Iraqi Freedom. According to the Special Inspector General for Iraq Reconstruction (SIGIR), 93 companies have provided physical security services for \$5.9 billion in Iraq.³⁷ This large dollar amount shows the importance of the industry in Iraq and, it does not appear that this will decrease significantly in the near future. On the contrary, this may increase, especially after the projected withdrawal of U.S. troops. This is because the withdrawal of U.S. troops does not mean that Iraq Security Forces (ISF) will be capable of providing effective security throughout the entire country. Furthermore, U.S. facilities such as the embassy and private companies, which will continue their reconstruction tasks, will need PMCs. Thus, the need for PMCs will probably increase.

Because of the extensive use of PMCs, Iraq is a good case study to illustrate what kind of problems may emerge when using PMCs. Also, it offers a good contrast between the U.S. and Iraq, states on opposite ends of capabilities. One state is Iraq, a new

³⁷ Special Inspector General for Iraq Reconstruction, “Comprehensive Plan For Audits of Private Security Contractors to Meet the Requirements of Section 842 of Public Law 110-181,” October 17, 2008 (updated at May 8, 2009), 2, available at http://www.sigir.mil/audits/pdf/Section_842.pdf (accessed August 17, 2009).

democratic state and the other is the U.S., a superpower that has developed state institutions having the potential to regulate PMCs.

In my thesis research, my first objective is to show the different challenges PMCs pose for the U.S. and Iraq, because without defining the real challenges, reaching proper solutions is not possible. To expect these challenges to be the same for both countries is not logical. Thus, the solutions should not be expected to be the same. Moreover, because of the transnational nature of the PMI, national measures would not be sufficient without the support of international regulations.

In my research, I will examine this important problem of states for which an effective solution has been sought by the international community. To find a solution as soon as possible is as important as the quality of the solution itself, because each day countries increase the dependency on PMCs, and the PMI gains more power.

D. OVERVIEW OF THE MAIN CHAPTERS

1. Chapter II: Private Military Companies and Theories of Civil-Military Relations

As part of political science, Civil-Military Relations (CMR) has dealt with the relationships between governments and the military for decades. The main concern of the scholars of CMR has been only the control over the military by governments. Therefore, the main purpose of prominent theories of CMR has been to find ways to make the military a tool of the state. The most prominent theories are militarizing the military with professionalism (objective civilian control); civilianizing the military with professionalism; the principal-agent theory; interservice rivalry and mission-threat based control. The inventors of theories dealt with only the control problems in the relationships between government and the military.

Bruneau and Matei have brought strong insight into CMR. They argued that police forces, which sometimes perform military-like missions and intelligence agencies, should be examined as elements of CMR.³⁸ Moreover, they argue that examining only

³⁸ Thomas C. Bruneau and Florina Cristiana Matei, "Towards a New Conceptualization of Democratization and Civil-Military-Relations," *Democratization* 15, no. 5 (December 2008), 916.

the control issue is not sufficient to determine the real tensions in CMR. “What security forces do, and at what cost, that is, their effectiveness and efficiency, and the implications of their roles and missions for democracy” are also important issues for CMR.³⁹

PMCs have been implementing the functions of all three security instruments for years. So, it is not wrong to say that PMI is an alternative security provider for states. Thus, PMCs must be included in the study of CMR. In this chapter, I will discuss the theories of CMR and whether they can cover PMCs. The main argument of this chapter will be that principal-agent theory and new institutionalism are the most promising ones for covering all the security instruments as well as the three dimensions of CMR: control, effectiveness and efficiency.

2. Chapter III: Incentives and Challenges in the Use of PMCs

As mentioned above, the main reasons for the rise of PMCs are the political instability that emerged after the end of the Cold War, the diminished interests of superpowers in politically unstable areas, and the extensive downsizing of national militaries. However, there must be incentives for states to use PMCs rather than public armed forces. From realists’ perspectives, incentives create choices.

My main argument in this chapter will be that the incentives of states, in the use of PMCs, differ according to the type of the state; strong state or weak state. I classify states as strong and weak by looking at their capabilities. Strong states have four main incentives.

- (1) PMCs are perceived as cost-efficient,
- (2) PMCs are flexible and can be deployed in theater rapidly,
- (3) PMCs increase the effectiveness of public armed forces by decreasing their task burden,
- (4) PMCs are effective tools for escaping political pressures.

As for the weak states, their incentives are not related with effectiveness or efficiency. Often, PMCs are the only options of weak states due to the absence of strong

³⁹ Bruneau and Matei, “Towards a New Conceptualization of Democratization and Civil-Military-Relations,” 909.

militaries and political restrictions imposed by international organizations. Furthermore, in some cases, such as the Iraq War, PMCs were used without the consent of weak states.

As with incentives, the types and degree of challenges PMCs imposed on states are not the same due to the differences in the capacities of state institutions and armed forces. Weak states are faced with more crucial problems than strong states. Moreover, strong states need mainly political will for overcoming the problems related to the realm of PMCs. However, weak states need more than just political will. In the chapter, I will examine the main challenges of strong states and weak states in the use of PMCs.

3. Chapter IV: Case Study—Private Military Companies in Iraq

The Iraq War and its reconstruction efforts are the most recent example for the extensive use of PMCs. Because of extensive use in Iraq, the problems have become more visible than before. In this chapter, I will present the main challenges for the U.S. as a strong state and for Iraq as a weak state.

The main challenges for the U.S. are:

- (1) A decreasing international reputation due to the immunity of PMCs in Iraq.
- (2) The unclear definition of “Inherently Governmental Functions” and non-transparent nature of private military contracts harm the legitimacy of outsourcing military functions, and in turn, this harms the values of democracy.
- (3) Wasting of taxpayers’ dollars due to uncompetitive contracting and cost-reimbursement contracts and also due to insufficient oversight on contracts.
- (4) Negative effects on military functions due to the unreliability of PMCs.

As for Iraq, the main challenges are related to the survival of democratic Iraq. These are:

- (1) PMCs (especially operational functions) impose an important threat to the sovereignty of Iraq.
- (2) The use of PMCs will be an obstacle in the development progress of Iraqi Security forces (ISF).
- (3) PMCs may be a good opportunity for ethnic groups to be armed. And this, in turn, may create a security dilemma between the factions.

4. Chapter V: Options for Regulating PMCs

In the literature, we can find several alleged solutions for regulating PMCs. They range from a complete ban on PMCs' activities to the self-regulation of the PMI. It is obvious that while self-regulation of the industry is advocated by some of its proponents, a complete ban of PMCs' functions is seen as the best solution by some of their opponents. My first argument in this chapter is that neither self-regulation nor a complete ban can be a solution for the regulation of PMCs. They are so integrated into the military operations of states (especially strong states), that such states cannot give up using PMCs without experiencing significant difficulties. Also, we can say that PMI has had a self-regulating system for decades due to the absence of an alternative regulatory system. If it has been working, why fix it? Thus, these two extreme alternatives cannot be right answers to the question: which system is best for regulating PMCs?

My answer for this question is that a registration and licensing system that is supported by national laws can be effective for all types of states. However, specific characteristics of a system must be different according to the types of states (strong or weak). Moreover, national regulations cannot be sufficient without international support because of the transnational nature of the PMI. An international institution under the command of an international organization must be established. The main activity of this institution should be to serve as a guide for all states on regulating and contracting. Moreover, international laws must support the regulation systems by organizing juridical responsibilities of states in cases of unlawful behavior of PMCs and their employees.

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II. PRIVATE MILITARY COMPANIES AND THEORIES OF CIVIL-MILITARY RELATIONS

Security of a state is very important to the extent that when we apply Maslow's hierarchy of needs to the states, it takes first priority. Unless a state can provide its own security, discussing other issues, such as development, is impossible. The military has been the instrument to meet this important need of states for centuries. However, the military is not the only security instrument of states. As stated by Bruneau and Matei, police forces, which sometimes perform military-like missions, and intelligence agencies are the other security instruments of states.⁴⁰ Also, PMCs, the main interest of this research, must be considered as alternative security providers for states.

Security forces are not only important in wartime, but also in peacetime, for providing security for their society. Moreover, they are the instruments for reaching national interests in the international arena by implementing violence or by posing a threat to opponents.

As an area of political science, CMR often focuses on the military, but not on the other security forces. Because of the huge capacity of the military for implementing violence, it is perceived as the most important threat for democracy by scholars of CMR such as Huntington, Janowitz and Feaver. For example, Feaver states that "The civil-military challenge is to reconcile a military strong enough to do anything the civilians ask them to with a military subordinate enough to do only what civilians authorize them to do."⁴¹ Thus, besides external security, the leaders of democratic states have another concern. It is to establish democratic civilian control over military forces. However, in the CMR realm, threats to civilian governments by the military should not be the only concern. As stated by Bruneau and Matei, "Democracies should consider control over all

⁴⁰ Bruneau and Matei, "Towards a New Conceptualization of Democratization and Civil-Military-Relations," 909.

⁴¹ Peter Feaver, "The Civil-Military Problematic: Huntington, Janowitz, and the Question of Civilian Control," *Armed Forces and Society* 23, no. 2 (Winter 1996), 149.

instruments of security in implementing the spectrum of roles and missions.”⁴² And examining “what security forces do, and at what cost, that is, their effectiveness and efficiency, and the implications of their roles and missions for democracy” is also an important issue for civil-military relations.⁴³ So, the classic question is: how can effective and stable relations between government and security forces be established?

CMR is an area of political science that seeks a satisfying answer for this question. As mentioned above, scholars have generally tried to establish a theory that can be used by states to establish a military institution that is effective and also subordinate to civilian leaders. In this chapter, I will examine some of these theories of civil-military relations. The main purpose of this examination is to evaluate whether the theories cover all of the security forces, especially PMCs, and which of them can be a guide to regulate PMCs. It is worth noting that a theory must be applicable to all cases regardless of the specific characteristics of the cases. In other words, if a theory cannot answer the main questions in a case, this means that it is not sufficient.

In the first section, I will examine the “objective civilian control” of Samuel Huntington, which is still influential today. According to this theory, an autonomous apolitical military is the only solution. In other words, his answer for the question of CMR is “objective civilian control” that can be achieved by militarizing the military. In the same section, I will also review the theory of Janowitz who used “professionalism” like Huntington. But his solution is quite different: civilianizing the military. In the second section, I will review “inter-service rivalry” and in the third section “threat-mission based control.” In the fourth section, I will examine the “principal-agent” theory of Peter Feaver. Indeed, as he noted, this is not a theory but a framework that draws the structure of the relations between security forces and government.⁴⁴ As for the fifth section, I will examine “new institutionalism,” which is very useful for defining the

⁴² Bruneau and Matei, “Towards a New Conceptualization of Democratization and Civil-Military-Relations,” 916.

⁴³ Ibid., 909.

⁴⁴ Peter D. Feaver, *Armed Servants: Agency, Oversight and Civil Military Relations* (Cambridge: Harvard University Press, 2003), 54.

problems and offering solutions for stable civil-military relations. And finally, I will conclude this chapter with a section in which regulation of PMCs will be evaluated with regard to these theories.

A. MILITARIZING OR CIVILIANIZING MILITARY

“Objective civilian control,” which was presented by Samuel Huntington, is among the most influential theories of CMR. In “The Soldier and the State,” written in 1957, Samuel Huntington claims that democratic states can establish the critical balance that is a military strong enough against external threats, but weak relative to civilian leaders, only by establishing “objective civilian control.”⁴⁵ Objective civilian control means full subordination of the military to the state. In other words, it makes the military a tool of the state. The antithesis of “objective civilian control,” according to Huntington, is “subjective civilian control.”⁴⁶ Unlike the former, the latter means the subordination of the military to a specific civilian group or groups. Huntington argues that subjective civilian control is the tool of a civil group to get more power among the other civil groups. For example, he reviews the struggle for power between parliament and the crown in England and America of the seventeenth century. He describes the control of the military by crown as a subjective civilian control. Also he defines Parliament’s attempt to increase its control over the military as a struggle for power between the two civilian sides.⁴⁷

According to Huntington, objective civilian control can only be established by recognizing an autonomous, politically neutral and sterile military. He says that the way to achieve this is by professionalizing the military.⁴⁸ He saw officership as a profession like any other profession, such as lawyers or doctors. He presented three fundamental elements to define profession: expertise, responsibility and corporateness. According to him, the expertise of officers, in general terms, is the management of violence with the

⁴⁵ Samuel P. Huntington, *The Soldier and The State: The Theory and Politics of Civil Military Relations* (Cambridge: Harvard University Press, 1957), 83–85.

⁴⁶ Ibid., 83.

⁴⁷ Ibid., 81.

⁴⁸ Ibid., 83, 84.

responsibility to protect society. As for the corporate character of officership, being an officer requires special training and education. Moreover, the corporate structure of the military profession includes military schools, journals, associations, traditions and customs.⁴⁹ In sum, according to the theory, military professionalism leads to an autonomous, apolitical military and this, in turn, this leads to objective civilian control which means military subordination to elected civilian leaders.

Morris Janowitz interpreted military professionalism differently. He presented the constabulary concept that reflects the changing nature of the military profession. He argues that the difference between peacetime and wartime concepts has disappeared. The military profession not only requires conventional warfare skills, but also skills in limited warfare, police functions, a combination of managerial/technical skills and the ability to understand international affairs.⁵⁰ Moreover, he saw the military profession as being integrated into society due to sharing of common values.⁵¹ Janowitz, unlike Huntington, argues that subordination of the military requires education in politics. This does not mean a political military. He states that the goal of political education is “to develop a commitment to the democratic system and an understanding of how it works.”⁵² According to Janowitz, by gaining knowledge of politics, military officers become “subject to civilian control not only because of the rule of law and tradition, but also because of self-imposed professional standards and meaningful integration of civilian values.”⁵³ In sum, Janowitz, contrary to Huntington’s idea of militarizing the military, supports the idea of civilianizing the military.

Although the two scholars presented different portraits of the military profession, the ways of establishing civilian control over a military are similar: self-subordination of military to civilian leaders. According to Huntington, this is possible by an autonomous, politically sterile military, but according to Janowitz it is only possible by a military that

⁴⁹ Huntington, *The Soldier and The State: The Theory and Politics of Civil Military Relations*, 8–18.

⁵⁰ Morris Janowitz, *The Professional Soldier* (New York: Free Press, 1971), 419.

⁵¹ *Ibid.*, 440.

⁵² *Ibid.*, 439.

⁵³ *Ibid.*, 420.

is integrated into society and aware of political affairs. Although the two theories brought strong insights into the political science and they are still influential, they are not perfect. They have fundamental weaknesses.

First of all, they presented their ideas only by considering American civil-military relations. If they are correct in their ideas, it is not wrong to say that the militaries of states in which coups were seen were not professional. Otherwise, their theories cannot be applicable to all cases. Second, their approaches to the “civil-military problematique”⁵⁴ are one-sided. As stated by James Burk, while Huntington mainly focused on the physical protection of the society or democratic state, Janowitz only focused on sustaining democratic values.⁵⁵ Huntington gave most of his attention to the physical security of the state to the extent that he saw the weakening of liberalism as the requisite for military security.⁵⁶ Third, they do not cover the current CMR. As argued by Burk, the current scope of CMR has gained a transnational nature.⁵⁷ But both of the theories deal with only the internal matters of CMR. Fourth, neither of the theories include the external control mechanisms. Both of them supposed the self-imposed subordination of the military. However, as stated by Feaver, a comprehensive CMR theory must include external control mechanisms.⁵⁸ Finally, the other dimensions of CMR, effectiveness and efficiency of the military, and the other security instruments such as PMCs, which are very related to the current CMR have not been considered by these two theories.

B. INTERSERVICE RIVALRY THEORY

Interservice rivalry theory is based on the organizational structure of the military. The theory presents a simple formula on the control over military; divide and control.

⁵⁴ Peter Feaver, “The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control,” *Armed Forces and Society* 23, no. 2 (Winter 1996), 150.

⁵⁵ James Burk, “Theories of Democratic-Civil Military Relations,” *Armed Forces and Society* 29, no.1 (Fall 2002), 14.

⁵⁶ Huntington, *The Soldier and The State: The Theory and Politics of Civil Military Relations*, 456.

⁵⁷ Burk, “Theories of Democratic-Civil Military Relations,” 20.

⁵⁸ Feaver, “The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control,” 167.

Interservice rivalry theory tells about the transformation of the conflict from the civil-military level to the service-service level. As stated by Huntington, the conflicts in the organization itself moderate the conflicts between organizations.⁵⁹ Moreover, Huntington argues that “American civil-military relations in the postwar decade, however, were characterized by the relative lack of sharp conflict between a united military establishment and either the State Department or Budget Bureau.”⁶⁰

Besides its positive impact on CMR, there are important side effects of interservice rivalry. James R. Locher stated these side effects accurately. He saw interservice rivalry as the main cause of failures in the Vietnam War, the seizure of USS Pueblo, the seizure of the Mayaguez, the failed Iranian rescue mission, the Marine barracks bombing in Beirut and the Grenada Incursion. According to Locher, interservice rivalry caused three main problems for operations: “poor military advice to political leaders, lack of unity of command and inability to operate jointly.”⁶¹ Interservice rivalry causes a huge isolation of military services from each other. And the severe competition between them, in order to get more power on decision-making processes and to get more money from the defense budget, separate them and thus cause poor performance in the battlefield. For example, “Colonel James Kyle, U.S. Air Force, who was the senior commander at Desert One, would recall that there were ‘four commanders at the scene without visible identification, incompatible radios, and no agreed-upon plan, not even a designated location for the commander.’”⁶² Moreover, inefficiency in defense procurement is another side effect of interservice rivalry. For example, as stated by Locher, the Department of Defense suffered from inefficiency because “communications, refueling, and other vital systems and devices were not interoperable across the services.”⁶³

⁵⁹ Huntington, “Interservice Competition and the Political Roles of the Armed Service,” *The American Political Science Review* 55, no. 1 (March 1961), 51.

⁶⁰ *Ibid.*, 41.

⁶¹ James R. Locher, “Has it worked?: The Goldwater-Nichols Reorganization Act- Department of Defense Reorganization,” *Naval War College Review* 54, no. 4 Autumn 2001, 99.

⁶² *Ibid.*, 100.

⁶³ *Ibid.*

Interservice rivalry theory provides too narrow viewpoint to civil-military relations. It focuses only on the control dimension of civil-military relations. It changes the level of conflicts, but does not solve them. The effectiveness and efficiency of military organizations are not issues of this theory. In fact, the effectiveness and efficiency of the military are affected negatively by interservice rivalry at the price of control over military organizations. Furthermore, similar to the theories of Huntington and Janowitz, interservice rivalry does not cover the transnational nature of the civil-military tensions.

C. THREAT-MISSION BASED CONTROL OVER MILITARY

Threat based theory is one of the alternative civil-military relation theories. Michael C. Desch presented the theory by including the external factors of a state as well as internal factors. In fact, he considers four main internal factors (individual leaders, military organizations, state structures and societies) as intervening variables and threat (in two types: external and internal) as independent variables. He examines the strength of CMR as outcomes of the responses of intervening factors to the types and levels of threat.⁶⁴ He divides threat environment into four categories according to the levels of external and internal threats.

		External Threats	
		High	Low
Internal Threats	High	Poor (Q3)	Worst (Q4)
	Low	Good (Q1)	Mixed (Q2)

Figure 1. Civilian Control of the Military as a Function of Location and Intensity of Threats (From Michael C. Desch, *Civilian Control of the Military*)

⁶⁴ Michael C. Desch, *Civilian Control of the Military: The Changing Security Environment*, (Baltimore: The Johns Hopkins University Press, 1978), 11.

According to his theory, the responses of intervening variables are predictable in the first and fourth categories. In the first category, high external threat leads to a unified outward-oriented military, a unified society, experienced leaders, convergent ideas in society and finally “objective” civilian control. He defines civil-military relations in this category as the most stable one. In the fourth category, high internal threat leads to inexperienced leaders, divided society and divergent ideas, a unified but internal-oriented military and “subjective” civilian control. He defines the civil-military relations in this category as the worst one.⁶⁵ Although it is logical that high external threats lead to a united society and an outward-oriented military, it is not clear that how it provides experienced civilian leaders. Moreover, one may ask the questions: What if military leaders gather too much political power in the case of a high external threat? Which mechanism can guarantee democratic control over the military?

As for the second and third categories, the responses of intervening variables and outcomes are not clear. At this point, the importance of mission or military doctrine comes into play. According to Desch, “internally oriented militaries should be harder to control than externally oriented militaries.”⁶⁶ In other words, assigning external missions to militaries makes the control much easier. Desch’s theory brings a different insight into the civil-military relations realm, but it cannot answer some of the questions, such as how can democratic control over military be established when the level of external threat is low? Which mechanisms can protect stable civil-military relations? How can an effective military be established without decreasing democratic civilian control? Furthermore, the other security instruments of state are not the subject of this theory. Therefore, the theory is not sufficient to be a guide for states in their relations with security forces.

Paul Shemella supported Desch as stated that “...civilian leaders, with professional military advice, must ensure that the roles and missions of their armed forces remain legitimate and wherever possible, externally focused.”⁶⁷ According to Shemella

⁶⁵ Desch, *Civilian Control of the Military: The Changing Security Environment*, 16.

⁶⁶ Ibid., 18.

⁶⁷ Paul Shemella, “The Spectrum of Roles and Missions of the Armed Forces,” in *Who Guards the Guardians and How: Democratic Civil-Military Relations*, ed. Thomas C. Bruneau and Scott D. Tollefson, (Austin: University of Texas Press, 2006), 138.

the roles of military, which he defines as “warfighter,” “defender” and “peacemaker” are the more suitable roles for effective civil-military relations than “fire fighter” and “police officer” roles, which focus on internal conflicts.⁶⁸

Contrary to Desch, Shemella gives a prescription for the effective control over the military. He states, “Institutional mechanisms for democratic civilian control of the armed forces are an indispensable tool that governments use to avoid falling into the troublemaker⁶⁹ category.”⁷⁰

D. PRINCIPAL-AGENT THEORY

The principal-agent theory of CMR aimed to explain the main problems of interaction between civilians and military leaders. The theories, explained above, could not even define the exact problems of current CMR. Peter Feaver recognized that in the United States (in fact, in mature democracies) the danger of a military coup is almost nonexistent. He defines the main issue of civil-military relations as whether the military is directed by civilian leaders. According to him, the main problem of CMR in mature democracies is a military that is “shirking.” Feaver used the term “shirking” to refer to activities of militaries that are contrary to the “functional goal”⁷¹ or the “relational goal” of civilians. Functional goal includes whether the military is doing what civilians asked it to do in the style that civilians directed, whether the military is using its full capacity to implement the civilians’ orders and whether the military is capable of implementing its tasks. As for the relational goal, it includes whether key policy decisions belong to civilians or the military, whether civilians decide which decisions should be given by the military, and whether the military is avoiding any action that may undermine civilian supremacy.⁷²

⁶⁸ Shemella, “The Spectrum of Roles and Missions of the Armed Forces,” 138.

⁶⁹ Shemella used the term ‘troublemaker’ to define the countries that have the poorest civil-military relations.

⁷⁰ Shemella, “The Spectrum of Roles and Missions of the Armed Forces,” 138.

⁷¹ Functional Goal: Protection from external enemies; Relational Goal: To remain in political control over their destiny.

⁷² Feaver, *Armed Servants: Agency, Oversight and Civil Military Relations*, 61.

Principal-agent theory is based on the delegation of an authority from a principal to an agent. In other words, it is a relationship in which agents use an authority on behalf of their principals. According to Feaver, contracts are the main tools for establishing a principal-agent relationship.⁷³ Thus, in regard to CMR, governments delegate the authority of the use of force to the military that is an agency of government by a social contract.

Feaver presents some features (or problems) that have important influences on principal-agent relationships. First of all, there is information asymmetry between principal and agent. In CMR, the advantage of information is on the side of the military.⁷⁴ As stated by Feaver, in the case of operations and war, the information asymmetry increases in favor of the military because of difficulties in monitoring.⁷⁵ Moreover, secrecy restrictions that are common in defense matters reinforce the tendency of the military to hide information.⁷⁶ Information asymmetry provides the military an important power to pursue its own institutional interests.

Second, adverse selection is one of the main problems of principal-agency relations. According to Feaver, adverse selection is the uncertainty of principal about the capability and qualifications of its agents.⁷⁷ He says that “It also refers to the fact that the very act of hiring creates perverse incentives for the agent to misrepresent itself, which thereby increases the chances that the principal will hire a lout: it is hard to verify the true type and a lout has a great incentive to appear even more attractive than a good worker.”⁷⁸

The final one is the moral hazard. In Feaver’s words, “moral hazard refers at a general level to the problem that principals cannot completely observe the true behavior

⁷³ Feaver, *Armed Servants: Agency, Oversight and Civil Military Relations*, 54.

⁷⁴ *Ibid.*, 69.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 71.

⁷⁷ *Ibid.*, 73.

⁷⁸ *Ibid.*

of the agent and so cannot be certain whether the agent is working or shirking.”⁷⁹ As stated by Feaver, agents or employees have incentives to do less, if they can get paid the same amount for doing so.⁸⁰

Moreover, Feaver presented two main requirements to prevent the military from shirking: monitoring mechanisms and punishment mechanisms. He states that “Civilians still have means available with which to direct the military and thereby mitigate the adverse selection and moral hazard problems inherent in delegation. In essence, control or monitoring mechanisms are ways of overcoming the information problems...perhaps by getting the agent to reveal information or perhaps by adjusting the incentives of the agent so that the principal can ‘know’ that the agent wants what the principal wants.”⁸¹ He makes a list of monitoring mechanisms: contract incentives, screening and selection, fire alarms, institutional checks, policy patrols and revising delegation decision.⁸² As for the punishment mechanisms, they are restrictive monitoring, current and future material disincentives, the military justice system and extralegal action such as verbal rebukes.⁸³

Feaver provides a powerful insight into the CMR realm. His theory explains the main structure and tensions of CMR, especially for mature democracies. Moreover, this structure is applicable to the relations between government and other security instruments. Feaver also recognizes the importance of external mechanisms to make the military subordinate to civilians. However, there is an important problem. Monitoring and punishment mechanisms are too static and they are not applicable to all of the security agents. Moreover, these control mechanisms may not be useful in all countries. Different characteristics of states and security agents require different control mechanisms.

⁷⁹ Feaver, *Armed Servants: Agency, Oversight and Civil Military Relations*, 74.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, 75.

⁸² *Ibid.*, 86.

⁸³ *Ibid.*, 94.

E. NEW INSTITUTIONALISM

In broad terms, new institutionalism is an approach that seeks to explain the effects of institutions on the behavior of individuals and organizations in an environment. It has sub-theories that “all seek to elucidate the role that institutions play in the determination of social and political outcomes.”⁸⁴ Institutions, as defined by Hall and Taylor, are “the formal or informal procedures, routines, norms and conventions embedded in organizational structure of the polity or political economy.”⁸⁵ In fact, institutions’ common purpose is to shape the relations between actors in an environment. In other words, institutions are created in order to arrange power relations in a society. As stated by Bruneau, “creating and implementing institutions is all about power, and institutional power relations therefore are a primary concern of New Institutionalism.”⁸⁶

In a democratic state, different bureaucratic organizations are in power relationships that are organized by institutions in order to direct organizations to an overarching goal: effectiveness and efficiency in functions of the state as a whole, while protecting the values of democracy. Here the subjects of New Institutionalism are how these institutions can shape these power relations, how and why a specific institution is created, what are the specific characteristics and power of an institution to achieve its goal, whether an institution fits to a society, and what are the unintended consequences of creating an institution.

The scholars of CMR must seek to arrange the relations between security instruments and civilian leaders in order to achieve two goals: effectiveness and efficiency of security instruments and to protect the values of democracy. Civilian control over the military, the only interest of old theories, cannot be the only purpose of civil-military relations. Moreover, as noted by James Burke, the scope of civil-military

⁸⁴ Peter A. Hall and Rosemary C. R. Taylor, “Political Science and Three New Institutionalisms,” *Political Studies* 44, no. 5 (December 1996), 936.

⁸⁵ *Ibid.*, 938.

⁸⁶ Thomas C. Bruneau, “Introduction” in *Who Guards the Guardians and How: Democratic Civil-Military Relations*, ed. Thomas C. Bruneau and Scott D. Tollefson, (Austin: University of Texas Press, 2006), 7.

relations has changed and it gains a transnational nature.⁸⁷ From the perspective of New Institutionalism, this means that CMR should also examine the effects of foreign and international institutions as well as the relations between security forces and foreign and international organizations.

It is important to recognize that the effects of the same institution on the power relations of organizations change from state to state. Cultural, sociological and structural differences cause different reflections of organizations to an institution in different countries. Thus, the main issue for the analysts of CMR should be defining the negative and positive effects of institutions in a specific country and seeking ways to eliminate the negative effects, or examining alternative institutions that are more suitable to that country.

New Institutionalism's approach in studying CMR has useful features. First of all, we can apply the approach for all types of security instruments and for both levels of relations (national and international). Moreover, it provides flexibility, which is very useful in regard to the changing characteristics of countries, security instruments, and specific roles and missions.

F. THE RELATIONSHIP BETWEEN PRIVATE MILITARY COMPANIES AND THE THEORIES

As alternative security providers for states, PMCs are indispensable elements of CMR. Their impacts on effectiveness and efficiency on the battlefield have been significant since the end of the Cold War. The main purpose of this section is to find out which theory or theories can explain and present solutions for the relations between PMCs and the state. In order to determine the most suitable approach for PMCs, we should examine the theories explained above from the aspect of PMCs.

First, the theories of Huntington and Janowitz are not applicable to PMCs. The main reason for this conclusion is that private security is not a profession as they argued for the military. Huntington argues that military officers' responsibility for protecting society is an important feature of military professionalism. According to him, there is no

⁸⁷ Burke, "Theories of Democratic-Civil Military Relations," 20.

monetary motivation for officership, especially in western countries. But for a private military contractor the private gain (monetary) is the only incentive and to talk about a responsibility for protecting society is almost impossible. Moreover, Huntington intentionally eliminated private security actors from his theory by stating that “the officer is not a mercenary who transfers his services wherever they are best rewarded, nor is he the temporary citizen-soldier inspired by intense momentary patriotism and duty but with no steady and permanent desire to perfect himself in the management of violence.”⁸⁸ Huntington and Janowitz argue that subordination of the military to the civilian government is provided by military officers voluntarily. Since private gain is the main incentive for PMCs, the possibility of voluntary subordination is extremely low. Thus, PMCs cannot be considered in these theories.

Second, interservice rivalry is not a promising theory for PMCs. The competition between PMCs for future contracts may be interpreted as an interservice rivalry. In fact, this competition is a natural characteristic of the private business sector. The competition has useful effects in the selection process, such as a tool for minimizing costs. Although inter service rivalry brings some useful insights to the issue, it is not comprehensive enough to explain all aspects of the challenges that PMCs pose. It is worth noting that to think of interservice rivalry as a monitoring and fire alarm system, rather than as a theory, is more useful.

Third, the threat and mission-based theory is complicated when applied to PMCs. Since PMCs are not permanent standing armies of state, the type of threat is not so important. PMCs are hired when they are needed. Of course, there are differences between using PMCs in the home country and using them abroad. However, to argue that the external or internal-oriented use of PMCs makes the relations more stable does not sound logical. As mentioned in the first chapter, PMCs provide various types of services ranging from logistical services to active combat services. Unlike the threat type, the mission type has important effects on the control of PMCs. For example, the control of active combat services is more difficult than of logistical services. Also, armed services

⁸⁸ Huntington, *The Soldier and The State: The Theory and Politics of Civil Military Relations*, 15.

cause ambiguous legal situations for PMCs and states. However, this mission-type approach is not sufficient to explain the main requirements for a stable relation between PMCs and government, and between PMCs and the other security instruments.

Fourth, the principal-agent theory of Peter Feaver provides a powerful structure that is applicable to PMCs. In fact, it is more suitable for PMCs than the military. As stated by Cockayne, contracting is one way to control PMCs by states that are principals.⁸⁹ A state, as a principal, delegates some power to a PMC to implement a specific mission by a business-type contract. In other words, contracts are the starter for the principal-agent relationship. Information asymmetry does exist between PMCs and states for the same reasons as the military. As for the adverse selection and moral hazard problems, they are stronger in PMCs than in the military. The only reason for this conclusion is that private gain is the only incentive of PMCs. The main purpose of PMCs is to get a contract. The question is whether the fulfillment of the mission is important for PMCs or not. One may answer yes to this question in regard to the importance of saving future contracts, but what if an extremely dangerous situation emerges? In other words, what if the only incentive (private gain) loses its importance against physical survival? Moreover, do PMCs implement their missions in the direction that states want? Or do they implement their missions in the direction that provides the best private gain for them? While honor and patriotism are important incentives in the military, this is not necessarily the case for PMCs. Therefore, state-PMC relations are more vulnerable to the adverse selection and moral hazard problems. There is another important point for PMCs as security agents. States are not the only principals for them. Foreign governments, NGOs, private corporations and even individuals can be principals. This feature makes the control issue more controversial for states, especially for operations abroad. Monitoring and punishment systems are indispensable tools for regulating the actions of PMCs. But there are no universal mechanisms that are effective in every state. They

⁸⁹ James Cockayne, "Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies," in *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, ed. Simon Chesterman and Chia Lehnardt (New York: Oxford University Press, 2007), 202.

should be different because of the different characteristics of states, such as capacity, regime type and culture. But Feather's mechanisms are constant and not applicable to every state.

At this point, the importance of New Institutionalism emerges. As explained above, institutions have influences on the actors. Thus, the behavior of PMCs can be regulated only by effective institutions. In PMCs case, there are two levels of institutions: national and international. While international institutions need to be sufficiently broad to cover the industry as a whole, national institutions need to be detailed and suitable for the specific characteristics of states.

In sum, the principal agent theory and new institutionalism theory together will be the main guides for the rest of the research as they provide more powerful insights into the CMR, especially for PMCs. In the next chapter, the challenges of using PMCs will be examined in detail.

III. INCENTIVES AND CHALLENGES IN THE USE OF PRIVATE MILITARY COMPANIES

In the first chapter, I stated the broad reason for the increase of PMCs: the downsizing of military forces and the increase in the number of conflicts due to the power vacuum after the end of the Cold War. We should examine the tendency for using PMCs in detail in order to understand the challenges for states. In fact, the challenges that states are facing change from state to state. In order to generalize the incentives and the challenges, I will use two classifications of states. The first classification is related with the capability of states: weak states and strong states. By weak states, I mean the states that do not have effective government institutions and armed forces and that are in conflict. By strong states, I mean the states that have developed governmental institutions, strong armed forces and a stable internal order. The second classification is related to the position of states in regards to using PMCs: home state, principal state and territorial state. The home state of a PMC is the state in which the PMC is based. The principal state of a PMC is the state that outsources some kind of military functions to that PMC as a security agency. As for the territorial state, it is the state in which a PMC is operating. Here, the important point is the home states and principal states hold some kind of control in their hands. Thus, they play active roles in regard to relations with PMCs. As for the territorial state role, it is a passive role, and these states have no control right over PMCs.

It is also important to note that states may have one or more roles in their relations with PMCs. Which roles a state may have depends on the type of state (strong or weak). Table 1 presents four combinations of state roles and shows the place of two types of states (strong and weak) in these combinations. As presented in the table, strong states always have at least one of two active roles in relations with PMCs (home state role, principal state role). This provides them some kind of control right over PMCs. They may also have territorial state roles as in the first combination. Here, the important point is that when they have territorial roles, they have both of the active roles as well. Thus, they hold all the control right in their hands when their territory is at issue. As for weak states,

in all combinations they have territorial roles. In combinations three and four they have one of two active roles, thus they have no absolute control right over PMCs. The most dangerous and the most common one is combination two in which weak states have to bear all the results of having no control option over PMCs.

TABLE 1	Home State Role	Principal State Role	Territorial State Role	Explanation
Combination 1	Both	Both	Both	PMCs operating internal missions for their governments
Combination 2	Strong State	Strong State	Weak State	U.S. or British PMCs operating for U.S. in Iraq
Combination 3	Strong State	Weak State	Weak State	U.S. PMCs operating for Iraq in Iraqi territory
Combination 4	Weak State	Strong State	Weak State	Iraqi PMCs operating for U.S. in Iraq

Table 1. Combination of State Roles

Another important point in the classification of roles is that a principal role may be played by non-state actors such as international organizations or private corporations. For example, in Iraq, we can see lots of private reconstruction firms that are hiring private security companies to provide security to their employees.

Now the question is: What are the effects of these roles on the states in regards to the challenges of using PMCs? Before answering this question, I will examine the incentives of states for using private military industry.

A. THE INCENTIVES OF STATES

The general dictionary meaning of “incentive” is “a thing that motivates or encourages one to do something.”⁹⁰ In this research, I will use the term meaning the reasons why states are using PMCs. Incentives of states differ according to the type of states. Thus, I will examine the incentives under two subsections.

1. The Incentives of Strong States

Strong states such as the United States have different types of security tools that have already proven their capabilities. So, while having capable security institutions, why do strong states choose to hire PMCs to do security-related tasks? Deborah C. Kidwell answered this question by stating, “Supporting regular forces with PMCs has the potential to be cost efficient, to be politically expedient, and to enhance military effectiveness and national security.”⁹¹

First of all, PMCs seem to be cost effective. Even though the contractors’ incomes may seem much higher than regular soldiers, they are paid for a specific time. In other words, unlike standing military, they are hired when they are needed. On the other hand, PMCs operate a smaller number of personnel than militaries. This is another factor that creates a perception that PMCs are cheaper. Jared F. Lawyer compared the costs of the Executive Outcome and the costs of the United Nations Peacekeeping (UNPK) forces in the cases of Angola and Sierra Leone. According to his study, the total cost of UNPK forces in Angola was \$626 million.⁹² As for the Executive Outcomes, its total cost for the Angola case was just \$60 million. And, in 1996, the U.S. Defense Science Board

⁹⁰ Encyclopedia.com, The Oxford Pocket Dictionary of Current English 2009, <http://www.encyclopedia.com/doc/1O999-incentive.html>

⁹¹ Deborah C. Kidwell, “Public War, Private Fight? The United States and Private Military Companies,” Kansas: Combat Studies Institute Press, 2005, 3, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA446127&Location=U2&doc=GetTRDoc.pdf> (accessed June 11, 2009).

⁹² J. F. Lawyer, “Military Effectiveness and Economic Efficiency in Peacekeeping: Public Versus Private,” *Oxford Development Studies* 33, no. 1 (March 2005), 103.

estimated that if military support functions could be privatized, \$30 billion could be saved by 2002.⁹³ According to these numbers, hiring PMCs may be extremely beneficial in material terms.

The second incentive for strong states is that PMCs enhance the effectiveness of regular militaries. There are two main reasons for this argument. First, as stated by Schreier and Caparini, PMCs free up military personnel by implementing non-operational military functions such as logistics, and providing protective functions in conflict areas.⁹⁴ Thus, the military can focus on its core tasks, which are operational military functions. Second, as stated by the Defense Science Board, more dollars, which can be saved by the privatization of military support functions, can be invested in combat effectiveness and modernization.⁹⁵

Third, as stated by Schreier and Caparini, PMCs are generally more flexible, and in emergency cases they are more suitable for rapid mobilization and deployments.⁹⁶ While regular militaries have to train soldiers for different situations, PMCs choose their employees, who are already trained in public forces, according to their training and experiences. Thus, PMCs have the potential to make important contributions to national and international security by mobilizing on short notice and offering states a “surge capacity.”⁹⁷

Fourth, as argued by Kidwell, “... contractors can offer additional political advantages (regardless of cost) to their clients.”⁹⁸ PMCs decrease the number of regular forces in theater. As a result, as stated by Schreier and Caparini, the political pressures

⁹³ United States Defense Science Board. “Achieving An Innovative Support Structure for 21st Century Military Superiority: Higher Performance at Lower Costs,” November 1996, ES-2, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA320394&Location=U2&doc=GetTRDoc.pdf> (accessed December 14, 2009).

⁹⁴ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 80.

⁹⁵ United States Defense Science Board, “Achieving an Innovative Support Structure for 21st Century Military Superiority: Higher Performance at Lower Costs,” ES-1.

⁹⁶ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 80.

⁹⁷ Ibid.

⁹⁸ Kidwell, “Public War, Private Fight? The United States and Private Military Companies,” 3.

associated with sending armed forces into unstable areas are decreased by using PMCs.⁹⁹ Moreover, casualties of individual private contractors are often not counted among the total casualties. In addition, “casualties among PMC employees wouldn’t cause the same political problems that the deaths of a country’s armed forces do.”¹⁰⁰ In fact, it is not wrong to say that this political reason is an incentive of governments rather than states as a whole.

2. The Incentives of Weak States

The roles of weak states (home/principal/territorial roles) in the cases of interaction with PMCs will be helpful to explain the incentives of weak states. As explained above, weak states are always territorial states without having all of the control. They may have all of the three roles only in the first combination (see Table 1), which is rare for a weak state. Therefore, being a territorial state without having control is an indicator of the weakness of the state.

It is important to note that strong states have the right to choose hiring PMCs or not. As for the weak states, this is not a matter of choice, because they have no resources to build effective armed forces and other state institutions. Moreover, they cannot do that due to other reasons such as high levels of corruption or internal political conflicts. Because of the absence of militaries or effective militaries, their incentive for using PMCs is only about survival. For example, in the cases of Angola, Sierra Leone, Croatia or Bosnia, the incentives of those states are not cost effectiveness or decreasing political pressures, but only the survival of the state itself. Moreover, in other cases, such as Iraq, the consent of weak states for using PMCs in their territories may have no importance.

Therefore, there is only one incentive for weak states: survival. While weak states’ incentive is a fundamental one, the incentives of strong states are secondary relative to weak states’ incentives. In sum, the use of PMCs by weak states is not by choice, but by necessity.

⁹⁹ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 81.

¹⁰⁰ Ibid.

B. THE CHALLENGES

The extensive use of PMCs brought important concerns such as to whether they are mercenary or not. Are they more effective and more efficient than the military? Are they legal entities? Are they beneficial or harmful to states? There is no clear answer to these questions. In fact, the answers depend on international and national institutions. If they are effective, PMCs can be useful, but otherwise they may cause severe problems. It is important to state that, like incentives the challenges that PMCs pose are different from state to state. In fact, they are more acute for weak states than for strong states.

1. Sovereignty and State Monopoly of Violence

As stated by Newell and Sheehy, there is a “belief that states should have a monopoly over the use of violence.”¹⁰¹ They define two functions of a state’s monopoly over violence. First, it justifies the state sovereignty, and second, it is required to fulfill a state’s responsibility that is protecting its citizens. The question is whether PMCs constitute a threat to a state’s monopoly over violence, and therefore, to a state’s sovereignty. In order to answer this question, we have to answer a sub-question.

The sub-question is about the meaning of monopoly over violence. Is monopoly over violence a monopoly over the use of violence or a monopoly over the management of violence? The latter sounds more logical, because PMCs do not pose a threat to a state’s sovereignty when that state has the capability to control and mitigate them. So the answer depends on the capability of states. As stated by Newell and Sheehy, if a state is economically and institutionally strong, the risk of PMCs undermining its sovereignty is small.¹⁰² Therefore, in regard to a state’s sovereignty, weak states, which do not have capability to control PMCs, are more vulnerable.

Moreover, the role of states in relation to PMCs has an important influence on the risk of losing sovereignty. Strong states are territorial states only when they have both the home state and principal state roles. In contrast, as I stated above, weak states are often

¹⁰¹ Newell and Benedict, “Corporate Militaries and States: Actors, Interactions, and Reactions,” 70.

¹⁰² Ibid., 77.

territorial states without having complete control. In most cases, PMCs are completely out of their control. This point clearly shows the different degrees of vulnerability of states.

Furthermore, as stated by Holmqvist, PMCs can be hired by rebel groups or other non-state actors in weak states.¹⁰³ These non-state actors can gain technological and operational advantages over a state's forces, which can severely harm the sovereignty of a state. Therefore, weak states that have no strong institutions have more to lose in terms of sovereignty when PMCs operate in their territories.

2. Legal Status and Accountability of Private Military Companies

Laws, whether international or national, can be among the most important institutions to regulate people, organizations and their behaviors. The legal status and accountability of PMCs and their employees are the most controversial issues in the industry. It is often unclear whether they are mercenaries or not. Are they lawful combatants or not? Do they have the rights of prisoners of war? Are private security contractors accountable under any law? Can they be tried or prosecuted by any authority for their unlawful behaviors? Is there any legal responsibility of the managers of PMCs for their employees' unlawful actions?

In order to answer these questions, we have to look at current international and national laws.

a. International Laws

Looking at international laws, none define and regulate PMCs. However, three international conventions are related to mercenaries.

- (1) Article 47 of Additional Protocol to Geneva Conventions (1977)
- (2) The Convention of Organization of African Unity (OAU) for Elimination of Mercenarism in Africa (1985)

¹⁰³ Caroline Holmqvist, "Private Security Companies: The Case for Regulation," prepared as a policy paper, Stockholm International Peace Research Institute (SIPRI), Policy Paper No. 9 (January 2005), 13.

- (3) The United Nations International Convention Against the Recruitment, Use Financing and Training of Mercenaries (1989)

Article 47 of Additional Protocol to Geneva Conventions presents a definition of mercenaries:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) Does, in fact, take a direct part in the hostilities;
 - (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) Is not a member of the armed forces of a Party to the conflict; and
 - (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.¹⁰⁴

¹⁰⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Part 3, Article 47.

TABLE 2		Condition of Being a Mercenary According to Art. 47 of the Geneva Conventions					
		Specially Recruited	Direct Participation ¹⁰⁵	Private Gain	Not Being a Party to the Conflict or resident in territory	Not Being a Member of Armed Forces of a Party	Having not been sent by another state officially
Nationalities of Contractors	Nationals of Principal State	+	?	+	-	-	-
	Nationals of Territorial State	+	?	+	-	-	-
	Third Country Nationals	+	?	+	+	+	+

Table 2. An Evaluation of Contractors According to the Legal Definition of Mercenaries

As mentioned by Millard, paragraph 1 of Article 47 “deprives mercenaries of the privilege to serve as lawful combatants and the immunity to be treated as prisoners of war upon capture.”¹⁰⁶ However, it does not prohibit the actions of mercenaries. In addition, paragraph 2 presents six requirements (see Table 2) to define mercenaries. Schreier and Caparini stated that “all six requirements of paragraph 2 must be satisfied for the definition to be met. A failure to satisfy one requirement is sufficient to prevent the definition being met. This is also the fundamental weakness of the protocol.”¹⁰⁷ Thus,

¹⁰⁵ “Direct participation” is not defined clearly.

¹⁰⁶ Todd S. Millard, “Overcoming Post Colonial Myopia: A Call to Recognize and Regulate Private Military Companies,” Master’s Thesis (The Judge Advocate General's School, April 2003), 41.

¹⁰⁷ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 149.

by definition, only third country nationals who take a direct part in conflicts may be called mercenaries. However, the convention does not define direct participation. In other words, it is not clear which actions should be considered direct participation.

The Convention of OAU for Elimination of Mercenarism in Africa presents a definition of mercenaries similar to Article 47 of Additional Protocol of Geneva Conventions. Again, all of the conditions must be met to call a person a mercenary. But, contrary to Article 47 of Additional Protocol, it is the first attempt to criminalize mercenarism,¹⁰⁸ stating:

The crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State, practices any of the following acts:

- a) Shelters, organizes, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;
- b) Enlists, enrolls or tries to enroll in the said bands;
- c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces.
- d) Any person, natural or juridical who commits the crime of mercenarism as defined in paragraph 1 of this Article commits an Offence considered as a crime against peace and security in Africa and shall be punished as such.¹⁰⁹

As noted by Goddard, this convention makes an important effort “as it seeks to legislate against mercenary activity, outlining responsibilities and obligations of member nation-states towards the prohibition, prevention, and judicial prosecution of mercenary related military actions.”¹¹⁰ However, it has some weaknesses. Schreier and

¹⁰⁸ Brent M. Jorgensen “Outsourcing Small Wars: Expanding the Role of Private Military Companies in U.S. Military Operations,” Master’s Thesis, (Naval Postgraduate School, Monterey, 2005), 40.

¹⁰⁹ Organization of African Unity, Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/433/Rev. L. Annex1 (1972), entered into force April 22, 1985, Article 1.

¹¹⁰ Goddard, “The Private Military Company: A Legitimate International Entity within Modern Conflict,” 35.

Caparini state these weaknesses. “The Convention does not cover the activities of PMCs, nor does it include corporate criminal responsibility, which may emerge as a crucial aspect of controlling PMC activities. Applicability is not universal, but limited to member states within the OAU and to those member states that have signed and ratified the convention....Although in force since 1985; the Convention has rarely been enforced.”¹¹¹

Another international attempt to regulate mercenarism is the U.N. International Convention Against the Recruitment, Use Financing and Training of Mercenaries. According to Schreier and Caparini, it is a good attempt at seeking “to prohibit and, to that end, establish as punishable offences, the recruitment, use, financing and training of mercenaries. Moreover, it requires that the state, in which the alleged offender is found, must exercise universal criminal jurisdiction or extradite the alleged offender to another state.”¹¹² However, it repeats the definition of Additional Protocol 1 of the Geneva Conventions. Moreover, Schreier and Caparini stated that “the scope of the convention only extends to the country where the mercenary activity has taken place, which means that it is difficult for states to take measures against other states acting in breach of the Convention. There is also no monitoring or enforcement mechanism, so the application relies on individual member states.”¹¹³ Furthermore, strong states, which use PMCs intensely, are not among the parties of the convention.¹¹⁴

If employees of PMCs are not mercenaries, what is their legal status? It is worth paying attention to the explanation of the legal status of PMCs by Schreier and Caparini. They stated that “PMC employees are not ‘noncombatants,’ as unarmed contractors are under the 4th Geneva Convention because they carry weapons and act on behalf of the government. However, they are also not ‘lawful combatants’ under the 3rd Geneva Convention because they do not wear regular uniforms or answer to a military

¹¹¹ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 148.

¹¹² Ibid.

¹¹³ Ibid., 150.

¹¹⁴ International Committee of the Red Cross, “Signatory States of U.N. International Convention Against The Recruitment, Use Financing and Training of Mercenaries,” <http://www.icrc.org/IHL.nsf/WebSign?ReadForm&id=530&ps=S> (accessed on August 9, 2009).

command hierarchy.”¹¹⁵ According to Schreier and Caparini, “They seem to fall into the same gray area as the unlawful combatants detained as suspected terrorists at Guantanamo Bay, Cuba.”¹¹⁶

In sum, the legal definition of mercenaries in international law is unclear and not sufficient to apply for private military contractors. My intention is not to show that PMCs are mercenaries or to say they should not be used. Whether they are mercenaries or not, they must be defined clearly. Otherwise, like the current situation, they are neither unlawful, nor can they be regulated for their criminal actions.

Moreover, there is a recent attempt at the international level to define and regulate PMCs. It is the Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies, which was written by a working group in the United Nations Commission on Human Rights. It defined the industry stating “A Private Military and/or Security Company (PMSC) is a corporate entity which provides on a compensatory basis military and/or security services, including investigation services, by physical persons and/or legal entities.”¹¹⁷ As stated by Jennifer K. Elsea, “The draft convention emphasizes that states should have an effective monopoly on the use of force, and that states are responsible under international law for their use of force whether on their own territory or beyond, and whether conducted by national armed forces or private armed groups operating under the state’s license or contract.”¹¹⁸ The draft convention would require states to establish their own regulatory systems and prohibit some activities of PMCs such as direct participation in armed conflicts, terrorist acts, violating territorial sovereignties of other states.¹¹⁹ However, the draft convention accepts the usual definition of mercenaries by stating that “Each State Party which has not yet done so shall consider ratifying the International Convention

¹¹⁵ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 57.

¹¹⁶ Ibid.

¹¹⁷ Office of the United Nations High Commissioner for human Rights, “Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies,” 6.

¹¹⁸ Elsea, “Private Security Contractors in Iraq and Afghanistan: Legal Issues,” 8.

¹¹⁹ Ibid.

against the Recruitment, Use, Financing and Training of Mercenaries.”¹²⁰ Thus, it does not bring a strong insight to differentiate PMCs’ employees and mercenaries. Moreover it is a draft document and not effective until signed and ratified by states. Therefore, international laws are lacking in regulating PMCs. The next step is looking at national laws.

b. National Laws

As mentioned above, there are some anti-mercenary international laws. However, they are not applicable to PMCs and their employees. Because of the insufficiency of international law, national laws must be considered. As stated by Singer, “for most of the world’s governments, though, there are simply no applicable laws that regulate and define the jurisdictions under which PMFs operate.”¹²¹ There are just two countries that have important national legislation that intend to regulate PMCs: South Africa and the United States. Unfortunately, these national laws are not effective for resolving the legal problems that surround PMCs.

According to Schreier and Caparini, South Africa’s Foreign Military Assistance Act is “the most far-reaching national legislation dealing with mercenaries, PMCs and PSCs.”¹²² As stated by Goddard, “Under its provisions and due enforcement by South African Law, the act sought to compel organizations, to seek government authorization for each contract with a foreign government.”¹²³ It says:

- (iii) foreign military assistance means military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of-
- (a) military assistance to a party to the armed conflict by means of-

¹²⁰ Office of the United Nations High Commissioner for human Rights, “Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies,” 9.

¹²¹ Peter W. Singer, “The Private Military Industry and Iraq: What Have We Learned and Where to Next?” Policy Paper for Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, November 2004, 13.

¹²² Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 107.

¹²³ Goddard, “The Private Military Company: A Legitimate International Entity within Modern Conflict,” 58.

- (i) advice or training,
- (ii) personnel, financial, logistical, intelligence or operational support;
- (iii) Personnel recruitment;
- (iv) medical or para-medical services;
- (v) procurement of equipment
- (b) security services for the protection of individuals involved in armed conflict or their property,
- (c) any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state.
- (d) any other action that has the result of furthering the military interests of a party to the armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict;
- (iv) mercenary activity means direct participation as a combatant in armed conflict for private gain;
- (vi) person means a natural person who is a citizen of or is permanently resident in the Republic, a juristic person registered or incorporated in the Republic, and any foreign citizen who contravenes any provision of this Act within the borders of the Republic;
- 2. No person may within the Republic or elsewhere recruit, use or train persons for or finance or engage in mercenary activity.
- 3. No person may within the Republic or elsewhere-
 - (a) offer to render any military assistance to any state or organ of state, group of persons or other entity or person unless he or she has been granted authorization to offer such assistance in terms of section 4;
 - (b) render any military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in terms of section 5.¹²⁴

¹²⁴ Republic of South Africa, "Regulation of Foreign Military Assistance Act," Government Gazette 395, no. 18912 (May 20, 1998), <http://www.info.gov.za/gazette/acts/1998/a15-98.pdf> (accessed on February 21, 2009).

According to the Act, South Africa prohibits any kind of mercenary activity in its territory. Also, the act prohibits its own citizens from offering mercenary activities to foreign states unless permission is granted by the government. However, this act is not without problems. The main problem is its enforcement mechanism. As Schreier and Caparini emphasized, “While the legislation is a major step forward in both intent and word, the Iraq conflict has demonstrated the difficulty of enforcing these new regulations.”¹²⁵ Some South African PMCs, such as Eryns and Meteoric Tactical Solutions, are operating in Iraq.¹²⁶ Even though they have not gotten approval from their government, the South African government has not been able to enforce its regulation. Another problem is presented by Newell and Sheehy, who argued that foreign military assistance is defined too broadly and thus includes support activities, like humanitarian aid.¹²⁷

As for the United States, it has a licensing system to regulate PMCs. The U.S. Arms Export Control Act regulates arms brokering and the export of military-related services. As pointed out by Schreier and Caparini, “US companies offering military advice to foreign nationals in the US or overseas are required to register with, and obtain a license from, the US State Department under the International Transfer of Arms Regulations (ITAR), which implement the Arms Export Control Act.”¹²⁸ The main purpose of this licensing system is to protect the national interests of the United States. However, the system does not provide an effective control over PMCs by itself. Criminal laws must be enacted to regulate PMCs’ actions abroad. Two Blackwater cases, especially, reveal the need for criminal laws for PMCs. Some literature mentions the Military Extraterritorial Jurisdiction Act and the Uniform Code of Military Justice as options for trying and prosecuting private military contractors. These laws will be discussed in the fourth chapter.

¹²⁵ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 107.

¹²⁶ Ibid.

¹²⁷ Newell and Sheehy, “Corporate Militaries and States: Actors, Interactions, and Reactions,” 96.

¹²⁸ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 105.

As a result, PMCs are in a legal vacuum. This lawlessness affects weak states severely because protecting their own citizens, a fundamental responsibility of states, is at the hands of foreign states. In other words, the justice in weak states depends upon the willingness and national laws of the home states of PMCs.

Of course, there are negative effects of this legal vacuum on strong states. It poses a threat to democratic values and the reputation of states in the international arena. As argued by Avant and Sigelman, extensive reliance on the private security market “has impeded constitutionalism and lowered transparency in the U.S.”¹²⁹ Moreover, a British Green Paper states that functions of the British PMCs affect Britain’s reputation because of the fact that people will assume some degree of the British Government’s approval on any activity of British PMCs.¹³⁰

3. The Effect on Public Armed Forces

The effects of PMCs on armed forces depend on the type of missions that PMCs perform in a particular case. In fact, the types of missions are mainly related to the capabilities of public armed forces. In other words, the degree of strength of public forces determines the states’ decisions to use PMCs in missions from the tip to the end of the spear. I will use Dew’s and Hudgens’ classification of missions,¹³¹ which I explained in the first chapter. But, as I stated before, I will use the term “operational military functions” for “attack operations” in order to include defensive missions.

a. Operational Functions

Why do states need PMCs for the operational functions of armed forces? The answer is simple: insufficient armed forces. It is obvious that this is a feature of weak states. As stated by Holmqvist, PMCs that perform operational functions provide short-

¹²⁹ Deborah Avant and Lee Sigelman, “What Does Private Security in Iraq Mean for US Democracy?” Paper prepared for the annual meeting of the International Studies Association, New York, NY, January 2008, 3, available at <http://www.international.ucla.edu/cms/files/PrivateSecurityandDemocracy.pdf> (accessed August 08, 2009).

¹³⁰ UK Foreign and Commonwealth Office, “Private Military Companies: Options for Regulation,” 63.

¹³¹ Dew and Hudgens, “The Evolving Private Military Sector: A Survey,” 18.

term benefits for states such as in the operations of Executive Outcomes and Sandline International in Sierra Leone.¹³² Even though Holmqvist only considered operational military functions, it is also true for protective functions. In order to reach long-term solutions, the building of capable public forces is indispensable.

As noted by Holmqvist, PMCs that perform operational functions create “a false image of security in the short term, which distorts proper assessment of security needs.”¹³³ In other words, states do not give enough attention to the improvement of public forces due to a false sense of security. Therefore, it is not wrong to say that the implementation of operational functions by PMCs poses a threat to the development of public forces.

Moreover, by implementing operational functions, PMCs make weak public forces weaker by deteriorating the prestige of public forces in the eyes of the public. This, in turn, erodes the justification of armed forces for the existence that is among the main interests of armed forces. Thus, the implementation of operational functions by PMCs may be perceived by armed forces as a direct threat to their existence. This in turn poses a threat to civilian governments.

b. Advice and Training Functions

Even though providing advice and training for armed forces is perceived as a non-core military function in regard to the spear concept, they can be more influential for long-term stability if they can be implemented with careful planning. This is a difficult process, however, and can take a long time.

Which states need PMCs for these functions? Unlike for operational functions, this time the answer is both weak and strong states. Even though weak states are in the majority in the use of PMCs for advice and training functions, strong states also use PMCs for specific training programs. But there is a difference between the two types of states. Strong states do not hire this type of services for making armed forces capable,

¹³² Holmqvist, “Private Security Companies: The Case for Regulation,” 13.

¹³³ Ibid., 12.

but for relieving the task burden of armed forces to focus on their operational functions. As for the armed forces of weak states, they need advice and training to be capable of doing operational functions. In most cases, advising on military issues is not limited to armed forces, but also consists of advising civilian officials. At this point, resentments among the officers of armed forces emerge. As stated by Schreier and Caparini, the resentments reach to their highest degree when the “officers of PMCs become preferential advisors for the government” and “are placed in higher command positions or stand in the way of normal promotion tracks of the local officer corps.”¹³⁴ For example, David Adams and Paul De La Garza describe the resentment of the high ranking military officials of Colombia in regard to Military Professional Resources Incorporation (MPRI): “Finally, Colombian officers felt patronized by retired American generals who hadn't seen combat in years.”¹³⁵

c. Support Functions

At the first glance, support functions appear to be least important among all functions. However, they are as important as the operational functions. Moreover, the majority of PMCs' functions outsourced by strong states are support functions. Let us recall one of the purposes of strong states in hiring PMCs: to improve the effectiveness and efficiency of armed forces, which are already capable of doing their operational functions, by assigning supporting functions to PMCs. If so, how can the support functions of PMCs affect the armed forces of strong states? The answer is by making them completely dependent on PMCs. More dependence on another agency means putting the operational functions under more risk, especially in emergency cases. This point is also related to the reliability of PMCs, which I will discuss in sub-section “5.”

Moreover, being independent from the types of functions necessary, PMCs affect personnel management function of the armed forces negatively in both types

¹³⁴ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 63.

¹³⁵ Paul De La Garza and David Adams “Contract’s End Hints of Colombia Trouble,” *St. Petersburg Times*, May 13, 2001, http://www.sptimes.com/News/051301/news_pf/Worldandnation/Contract_s_end_hints_.shtml (accessed February 9, 2009).

of states. Since PMI provides higher incomes for experienced military personnel, they tend to leave public services. David Barstow, a reporter for the *New York Times*, mentioned about \$500 to \$1500 a day for skilled military personnel.¹³⁶ Avant emphasized the gap in pay scales by stating that "...senior enlisted members of the Army Green Berets or Navy SEALs made about \$50,000 in base pay and that PMCs in Iraq and Afghanistan were paying these retirees salaries ranging from \$100,000-200,000/year...."¹³⁷ These high incomes in the private sector cause early retirements and resignations among military officers. Peter Singer presented an interesting argument that indicates the importance of the issue: "Special Forces commanders in Australia, New Zealand, the United Kingdom, and the United States have all expressed deep concern, with the policy responses ranging from the creation of special working groups of NCOs [Non-Commissioned Officers] to explore the retention issue to allowing troopers to take a year's leave of absence, in the hope that they would make their quick money and return, rather than be lost to the market forever."¹³⁸ Even though the ex-soldiers of weak states' militaries can earn less money than nationals of strong states for the same dangerous work, they are earning more than the soldiers of their countries. Thus, the high incomes in PMI have an important effect on armed forces of both types of states, by depriving them of experienced personnel.

4. Subordination of Private Military Companies

In theory, PMCs are supposed to be subordinate to their principals. However, in practice, there are two dimensions of their subordination — to their principals and their home countries. The question is whether PMCs can pursue principals' interests in their performances when the home and principal states are different. In other words, to whom are PMCs subordinate when the interests of principals and home states are in conflict? This creates a big problem for weak states. Since PMCs' main interest is private gain,

¹³⁶ David Barstow, "Security Companies: Shadow Soldiers in Iraq," *New York Times*, April 19, 2004, <http://www.nytimes.com/2004/04/19/international/middleeast/19SECU.html> (accessed October 31, 2009)

¹³⁷ Deborah Avant, "The Privatization of Security: Lessons from Iraq," *Orbis* 50, no. 2 (Spring 2006), 334.

¹³⁸ Singer, "The Private Military Industry and Iraq: What Have We Learned and Where to Next?" 16.

they have to consider their reputation in the eyes of home states in order to get contracts or approval for contracts with other countries. They have to take into consideration the national interests of home countries. Harry Ed Soyster, spokesman of MPRI in 1995, said, “They are using us to carry out American foreign policy. We certainly don't determine foreign policy, but we can be part of the U.S. government executing its foreign policy.”¹³⁹ These sentences indicate the importance of home states’ interests in PMCs.

Another striking challenge for weak states is the subjective control of PMCs in weak states. I use the term “subjective control” in the sense that PMCs work for the interests of only one faction in a weak state. Especially in the case of civil conflicts, PMCs provide security, not for all of the population but for the party who pays for PMCs. As stated by Holmqvist, PMCs may make weak states weaker “by leading to a skewed distribution of security among populations.”¹⁴⁰ The imbalance in the distribution of security causes more problems in conflicts and does not solve the main conflicts.

5. Unreliability of Private Military Companies

Since the only incentives for private contractors are private gains, it is often uncertain as to how they will perform in dangerous situations. During the contracting process, it is very difficult to see the exact security level. As stated by Avant, “There is nothing compelling contractors to remain on the battlefield once bullets begin to fly.”¹⁴¹ Also Singer stated that “A company has the choice of what contracts to take and when to depart or suspend operations because it believes that the situation is too dangerous relative to the rewards.” He adds that “Whereas a soldier has no legal discretion once they enlist or are drafted, an individual employee decides who he or she wants to work for, where, and for what price, and then, once in theatre, still has the choice on when to stay or leave (whether they get a better job offer from a competing firm, think the mission and/or their superiors are not worth it, or simply because they are tired of the job, want to

¹³⁹ De La Garza and Adams, “Contract’s End Hints of Colombia Trouble.”

¹⁴⁰ Holmqvist, “Private Security Companies: The Case for Regulation,” 12.

¹⁴¹ Avant, “The Privatization of Security: Lessons from Iraq,” 336.

see more of their family, etc.).”¹⁴² For example, because of a slew of contractor kidnappings in July 2004, and huge rates of violence in this period, U.S. forces experienced a wave of firms delaying, suspending, or ending operations.¹⁴³ Another example of the unreliability of PMCs was when the employees of the British PMC Ghurka Security Guards disbanded after the killing of their ground commander in Sierra Leone in 1995.¹⁴⁴

Avant points out another issue on reliability. She says that because the companies’ only incentive is private gain, they may tend to minimize costs by deploying fewer personnel with fewer skills, both of which can cause miserable results.¹⁴⁵ Moreover, the selection mechanisms of companies are also controversial. For example, Steve Fainaru emphasized the absence of clear standards for private military contractors. He stated that a contractor, while he carries various types of weapons in Iraq, was prohibited from carrying a firearm in the U.S. because of his past unlawful behaviors.¹⁴⁶

In sum, we ask the same questions as Xavier Renou: What if PMCs or their employees refuse to fight in the battlefield? “What if the PMCs defect for fear of losing profits?” Moreover, “Is it safe to share secrets they could use against their clients? What if they decide to prolong wars, or deter peace efforts to demand more funds? And how can they help restore peace if both sides of a conflict can hire them?”¹⁴⁷

6. Are PMCs Really Cheap?

In the literature, cost efficiency is among the advantages of using PMCs. However, there are some missed points in the calculation of costs.

¹⁴² Singer, “The Private Military Industry and Iraq: What Have We Learned and Where to Next?” 8.

¹⁴³ Ibid.

¹⁴⁴ Xavier Renou, “Private Military Companies Against Development,” *Oxford Development Studies* 33, no.1 (March 2005), 112.

¹⁴⁵ Avant, “The Privatization of Security: Lessons from Iraq,” 336.

¹⁴⁶ Steve Fainaru, *Big Boy Rules: America’s Mercenaries Fighting in Iraq* (Philadelphia, Da Capo Press, 2008), 62 and 63.

¹⁴⁷ Renou, “Private Military Companies Against Development,” 112.

First, the calculations are generally made for the short term. Paying the PMCs for a specific time seems cheaper than the cost to feed (including peacetime) more military forces to implement the same mission. However, the duration of missions is not always predictable.

The second point is that, as mentioned above, most of the employees of PMCs are ex-military personnel and their training costs, paid by societies, are not added into the calculations. In other words, states pay for individuals whom the states themselves have trained in the past. Renou states that sometimes the state must raise the salaries of military personnel to prevent them from joining PMCs.¹⁴⁸ As he notes, “in comparative approach to costs, the costs of pensions paid to people who are young enough to keep on working elsewhere should be considered.”¹⁴⁹

Another important issue concerning the costs of PMCs is the cost of oversight mechanisms or the cost of lack of oversight. In order to ensure the efficiency of PMCs, oversight mechanisms are the most important tools. However, they bring extra costs to the principals. Moreover, as mentioned by Renou, the absence of effective oversight mechanisms causes different types of cost; waste of resources, sacrifice of quality or overbilling.¹⁵⁰ For example, Halliburton overcharged the U.S. government with overpriced gasoline and for services not rendered (such as billing for meals not cooked). According to some Army auditors, it overcharged by an average of about 40 percent.¹⁵¹

Even when we do not consider these indirect costs, PMCs may be more expensive than militaries depending on circumstances and conditions. For example, a Congressional Research Service (CRS) report states that “in the case of personnel provided by one company (i.e., Blackwater Worldwide), the total cost of private security personnel was ‘significantly higher than the direct costs that would-be incurred by the [U.S.] military’ because of markups and other costs charged the U.S. government.”¹⁵²

¹⁴⁸ Renou, “Private Military Companies Against Development,” 111.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid., 111.

¹⁵¹ Singer, “The Private Military Industry and Iraq: What Have We Learned and Where to Next?” 7.

¹⁵² Jennifer K. Elsea, Moshe Schwartz and Kennon H. Nakamura, “Private Security Contractors in Iraq: Background, Legal Status and Other Issues,” Congressional Research Service, Order Code: RL32419, September 29, 2008 (updated on August 25, 2008), 49.

IV. CASE STUDY— PRIVATE MILITARY COMPANIES IN IRAQ

A. BACKGROUND

The most recent example of the extensive use of PMCs is the 2003 Iraq War and reconstruction efforts between the end of the war and today. PMCs in Iraq are mainly from the United States. However, there are companies from England, South Africa, Iraq and some other states, as well. Their employees are from all over the world: Americans, British, South Africans, Iraqis, Fijians, Nepalese and others. According to a Congressional Budget Office (CBO) report, the percentages of nationalities are as follow: 20 percent of contractors from the U.S., nearly 40 percent are Iraqis, and the remaining 40 percent are third country nationals.¹⁵³ They have been performing a broad range of services from logistical support functions and advising and training Iraqi armed forces to armed security services in Iraq. At first glance, to the services that PMCs provide in Iraq, no operational military functions are among them. But the level of security can change the nature of protective services such as static security and convoy security to operational military functions. Singer argued that services such as site security, personal security and convoy security should be considered tactical military roles because of the high risk of armed conflict.¹⁵⁴ Avant and Sigelman state that the name of a task may not reflect its actual function.¹⁵⁵ They explain this by emphasizing that “jobs not technically considered core military tasks take on great danger or ability to inflict harm when performed in the midst of an insurgency.”¹⁵⁶

The number of PMCs and their employees is not known exactly due to ignorance and insufficient tracking and reporting mechanisms. According to a SIGIR report, which was updated on May 8, 2009, there are 93 PMCs in Iraq.¹⁵⁷ The report also states another

¹⁵³ Congressional Budget Office, “Contractors’ Support of U.S. Operations in Iraq,” 9.

¹⁵⁴ Singer, “The Private Military Industry and Iraq: What Have We Learned and Where to Next?” 6.

¹⁵⁵ Avant and Sigelman, “What Does Private Security in Iraq Mean for US Democracy?” 10.

¹⁵⁶ Ibid.

¹⁵⁷ Special Inspector General for Iraq Reconstruction, Comprehensive Plan For Audits of Private Security Contractors to Meet the Requirements of Section 842 of Public Law 110–181,” 2.

233 companies, which cannot be identified as to whether they are related to physical security or some other kind of security (i.e., network security).¹⁵⁸ But, other resources give different numbers. For example, a CRS report estimates the number of PSCs at about fifty companies with more than 30,000 employees, not including Iraqi nationals.¹⁵⁹ Moreover, “In March 2006, the director of the Private Security Company Association of Iraq estimated that there were 48,000 employees from 181 security firms operating there.”¹⁶⁰ Finally, David Isenberg, in his most recent book, claims that “The total number of non-Iraqi PMC personnel is certainly less than 20,000, and despite claims to the contrary, PMCs do not constitute the second- or third- largest Army in Iraq....”¹⁶¹ It is important to note that these numbers are just for the security service, which is only one function of PMCs. According to a CBO report, there were nearly 190,000 private contractors of all stripes from truck drivers and cooks to armed security guards.¹⁶² By September 2009, the number of contractors has decreased due to the decrease in the number of U.S. troops. According to Moshe Schwartz, by September 2009, there were 113,731 DoD contractors in Iraq.¹⁶³ Of course there were also private contractors who were working for other U.S. agencies and for private firms, but the exact number is not clear. Even though the exact number is not known, it is certain that the presence of PMCs is at an unprecedented level in Iraq. Steve Fainaru’s statement about the extensive use of PMCs in Iraq indicates the importance of the issue: “after a while, the sight of an AK-wielding male was no more surprising than seeing a palm tree or a street vendor or a cat.”¹⁶⁴

¹⁵⁸ Special Inspector General for Iraq Reconstruction, Comprehensive Plan For Audits of Private Security Contractors to Meet the Requirements of Section 842 of Public Law 110-181,” 21.

¹⁵⁹ Elsea, Schwartz and Nakamura, “Private Security Contractors in Iraq: Background, Legal Status and Other Issues,” 3.

¹⁶⁰ Committee on Oversight and Government Reform, “Memorandum: Additional Information for Hearing on Private Security Contractors,” Washington DC., February 7, 2007, 2.

¹⁶¹ David Isenberg, *Shadow Force: Private Security Contractors in Iraq*, (London: Praeger Security International, 2009), 27.

¹⁶² Congressional Budget Office, “Contractors’ Support of U.S. Operations in Iraq,” 1.

¹⁶³ Moshe Schwartz, “Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis,” Congressional Research Service, December 14, 2009, 7.

¹⁶⁴ Fainaru, *Big Boy Rules: America’s Mercenaries Fighting in Iraq*, 103.

The cost of outsourcing military functions is another important issue that cannot be ignored. According to the SIGIR report the cost of private security services was \$5.9 billion by May 8, 2009.¹⁶⁵ But, a CBO paper estimates the total costs for private security services between \$6 billion and \$10 billion over the 2003-2007 period.¹⁶⁶ The CBO paper also states that \$3–6 billion of total costs belong to subcontracts.¹⁶⁷ Again these estimates of costs are primarily related to security services, but not all military-related services that PMCs have been performing in Iraq. The CBO report estimates \$85 billion for all contracts in the Iraq Theater, which constitutes 20 percent of U.S. spending in Iraq between 2003 and 2007.¹⁶⁸

Among the huge numbers of PMCs, several companies are more prominent as they are the holders of the biggest contracts. One of the biggest contracts in Iraq is the LOGCAP IV contract, which was awarded to three PMCs. These PMCs are DynCorp International, Fluor Intercontinental and Kellogg, Brown AND Root (KBR), which held the LOGCAP III contract by itself. The LOGCAP IV contract was awarded in 2006 as an Indefinite Delivery-Indefinite Quality (ID/IQ) contract.¹⁶⁹ This means that three companies would compete for task orders under the LOGCAP IV contract. The contract was a logistical support contract under the Department of Defense. It includes supply operations (such as food, water, fuel, etc.), field operations (such as laundry, sanitary, waste management, morale activities, etc.) and other operations, like engineering, construction and also support to communication networks. The costs of the contract would be a maximum of \$5 billion dollars per year for each company and the lifetime maximum cost of the contract would be \$150 billion.¹⁷⁰

¹⁶⁵ Special Inspector General for Iraq Reconstruction, “Comprehensive Plan For Audits of Private Security Contractors to Meet the Requirements of Section 842 of Public Law 110–181,” 2.

¹⁶⁶ Congressional Budget Office, “Contractors’ Support of U.S. Operations in Iraq,” 13.

¹⁶⁷ *Ibid.*, 14.

¹⁶⁸ *Ibid.*, 2.

¹⁶⁹ Valerie Bailey Grasso, “Defense Logistical Support Contracts in Iraq and Afghanistan: Issues for Congress,” prepared for Members and Committees of Congress, Congressional Research Service, June 24, 2009, 4–5.

¹⁷⁰ Grasso, “Defense Logistical Support Contracts in Iraq and Afghanistan: Issues for Congress,” 5.

Another big contract is Worldwide Personal Protective Services under the State Department. It was awarded to three companies, Blackwater, Triple Canopy and DynCorp again as an ID/IQ contract. It is a \$3.2 billion security program¹⁷¹ that includes various types of security tasks from providing security for government officials and static location security, to providing security for mobile operations.

Besides holding big contracts, some companies such as California Analysis Center, Incorporated (CACI), Blackwater and Ageis Defence Services gained notoriety for their unlawful activities. For example, in 2005, a web site displayed a video showing Aegis mercenaries shooting civilian vehicles accompanied by laughter and the voices of men joking with one another. As for Blackwater, its employees were involved in several incidents, among them the killing of 17 innocent Iraqis in 2007. Finally, the Abu Ghraib scandal, in which some of the CACI's employees were involved, is another incident that displayed the unlawful behaviors of contractors in Iraq.

The huge numbers and costs of private military contractors as well as their unlawful actions with no legal prosecution indicate that the history of the war in Iraq cannot be written without examining the role of PMCs.

B. THE EFFECTS OF PRIVATE MILITARY COMPANIES ON THE U.S. AND IRAQ

The extensive use of PMCs in Iraq made the problems of using PMCs more visible than before. As stated in the previous chapter, the scope of the challenges is very broad, ranging from fundamental ones (such as the threat to a state's sovereignty) to wasting national resources by outsourcing. It is obvious that the challenges for the United States and Iraq are not the same. There are three main reasons for this argument. The first one is that while the United States has strong armed forces and strong governmental institutions, Iraq, as a new democracy, is still trying to establish its own institutions and effective armed forces. Second, while Iraq's territory and citizens are directly subject to PMCs operations, the U.S.' homeland and citizens are thousands of miles away from the theatre. Finally, the United States' roles in relation to the PMCs in Iraq are the principal

¹⁷¹ Fainaru, *Big Boy Rules: America's Mercenaries Fighting in Iraq*, 137.

and home state roles, while Iraq often has the territorial state role without having the other two roles. I will discuss the effects of using PMCs on the U.S. and Iraq in two separate sub-sections in order to make clear my argument.

1. The Effects on the United States

As, the United States, has the principal role, it interacts with PMCs from the decision process for outsourcing to the end of the implementation of tasks that have been outsourced to PMCs. I will examine every phase of the interaction between the U.S. and the PMCs by starting with the decision making phase.

a. The Decision to Outsource Military Functions

There are several incentives for the United States, as a strong state, to outsource military functions: the perception that PMCs are cheaper than standing armed forces; PMCs are more flexible and can be deployed more rapidly than militaries; PMCs relieve the task burden of armed forces that make them able to focus on operational functions; and outsourcing military functions is a way of escaping internal and external political pressures. It is important to note that there are two differences that separate the last incentive from the first three. First, it is an incentive of the government rather than the state itself. Second, it has not been spelled out officially as a reason to outsource. However, it is a strong incentive (may be the strongest one) to outsource military functions.

Beyond the incentives of using PMCs, the question is what is the legal basis of contracting out the military functions? The term “inherently governmental functions” has the potential answer to this question. However, as stated in a White House Memorandum, “the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined.”¹⁷² There are two main definitions of

¹⁷² The White House, Office of the Press Secretary, “Government Contracting: Memorandum for the Heads of Executive Departments and Agencies,” March 4, 2009, available at http://www.tdgovernmentsolutions.biz/blog/wp-content/uploads/2009/10/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject_Go.pdf (accessed December 3, 2009).

“inherently governmental functions” within the federal law and policy of the United States. The first one is in the Federal Activities Inventory Reform (FAIR) Act of 1998. According to the act, “‘inherently governmental function’ means a function that is so intimately related to the public interest as to require performance by Federal Government employees.”¹⁷³ The second definition exists in the Office of Management and Budget (OMB) Circular A-76. According to the circular, “an inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel.”¹⁷⁴ Among the examples of types of inherently governmental functions, both the FAIR Act and OMB Circular A-76 state that:

- (2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (3) Significantly affecting the life, liberty, or property of private persons...¹⁷⁵

The question here is whether or not the armed functions of PMCs in Iraq fit the definition of inherently governmental functions? In fact, even though they are affecting the life and property of private persons, the response of the Defense Department is quite different. The DoD classifies its functions in three categories, a) functions directly linked to warfighting, b) functions indirectly linked to warfighting, and c) functions not linked to warfighting.¹⁷⁶ DoD’s defense review report emphasizes that functions directly linked to warfighting must be implemented by federal government

¹⁷³ Federal Activities Inventory Reform Act, 1998 Sec. 5, http://www.whitehouse.gov/omb/procurement_fairact/ (accessed July 7, 2009).

¹⁷⁴ Office of Management and Budget, Circular No. A-76, May 29, 2003, Attachment A- Sec. B, http://www.whitehouse.gov/omb/Circulars_a076_a76_incl_tech_correction/ (accessed July 7, 2009).

¹⁷⁵ Federal Activities Inventory Reform Act, 1998 and Office of Management and Budget, Circular No. A-76.

¹⁷⁶ Department of Defense, “Quadrennial Defense Review Report,” September 30, 2001, 53, <http://www.defenselink.mil/pubs/pdfs/qdr2001.pdf> (accessed June 2, 2009).

employees.¹⁷⁷ As a result, armed security services that are performed by PMCs are perceived as non-inherently governmental functions by the DoD due to the fact that they are not directly linked to warfighting.

The absence of a uniform and conclusive definition of “inherently governmental function” causes different interpretations by government agencies. This leaves the legitimacy of contracting out military functions controversial. In other words, the legal vacuum in the use of PMCs starts at the first instance. According to Luckey, Grasso and Manuel, “The 110th Congress required the Office of Management and Budget (OMB) to review existing definitions of inherently governmental functions and ‘develop a single consistent definition’ of inherently governmental functions by October 14, 2009.”¹⁷⁸ Unfortunately, OMB has yet to declare a definition.

b. Selection and Contracting Process

The selection and contracting process is the second phase in which the interaction between the government and PMCs actually starts. In other words, it is the first step of the principal-agent relationship. As noted by Schreier and Caparini, the U.S.-based PMCs are required to register and get a license from the State Department under the International Transfer of Arms Regulations (ITAR).¹⁷⁹ This requirement is needed for both internal and external missions. The main purpose of this system is to regulate U.S. PMCs that operate abroad and to ensure that PMCs will not operate against the national interests of the U.S. However, the Iraq case has showed that the system has weaknesses for a comprehensive regulation.

There are three main problems in the selection and contracting process of the United States. First, the criteria for selecting PMCs are not clear. Background checks for companies and their employees are insufficient or completely ignored. Moreover, the

¹⁷⁷ Department of Defense, “Quadrennial Defense Review Report,” September 30, 2001, 53, <http://www.defenselink.mil/pubs/pdfs/qdr2001.pdf> (accessed June 2, 2009).

¹⁷⁸ John R. Luckey, Valerie Bailey Grasso, Kate M. Manuel, “Inherently Governmental Functions and Department of Defense Operations: Background, Issues and Options for Congress,” Congressional research Service, September 14, 2009, 22.

¹⁷⁹ Schreier and Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” 105.

PMCs that have been operating for the U.S. are not only U.S. companies. United States has also hired PMCs based in other states. These foreign PMCs are outside the registering and licensing system of the U.S. The point is that there is no checking mechanism in place for foreign PMCs within the contracting process. For example, despite the notoriety of a British company (Aegis Defence), the U.S. Army Corps of Engineers renewed its contract for \$475 million.¹⁸⁰ Moreover, as stated by Steve Fainaru, the job requirements for individual contractors are not clear. According to his study in Iraq, a PMC employee who has been prohibited from carrying firearms in the U.S. can easily operate in Iraq by carrying grenades and even shoulder-fired missiles, let alone firearms.¹⁸¹ Another contractor (Emergency Medical Technician), whom Fainaru interviewed, stated that “Oh, I’m not really certified...But they made me a medic because I’ve read a lot of books. I have just haven’t gotten around to taking tests.”¹⁸² According to a Government Accountability Office (GAO) report, even though the State Department and the Defense Department had both developed background screening procedures for the employees of PMCs who are U.S. citizens operating in Iraq by July 2009, the Defense Department has still not developed screening procedures for PMC employees who are Iraqis and third country nationalities.¹⁸³

The second problem is related to the bidding processes of contracts. To get the best services at the best value, competition among the providers is very important. The Competition in Contracting Act of 1984 states that federal agencies shall obtain full and open competition by using competitive procedures.¹⁸⁴ The Federal Acquisition Regulation (FAR) states that “contracting officers shall provide for full and open competition through use of the competitive procedure(s) contained in this subpart that are best suited to the circumstances of the contract action and consistent with the need to

¹⁸⁰ Fainaru, *Big Boy Rules: America’s Mercenaries Fighting in Iraq*, 125.

¹⁸¹ *Ibid.*, 63.

¹⁸² *Ibid.*, 51.

¹⁸³ Government Accountability Office, “Contingency Contract Management: DoD Needs to Develop and Finalize Background Screening and Other Standards for Private Security Contractors,” report to Congressional Committees, GAO-09-351, July 2009, 3.

¹⁸⁴ United States Code 41, 253 (a) “Planning and Solicitation requirements” (1).

fulfill the government's requirements efficiently."¹⁸⁵ FAR presents some exceptions for using full and open competition in the bidding process. It gives several reasons for the exclusion of provider(s), such as reducing costs, continuous availability of a reliable source and national emergency.¹⁸⁶ Moreover, as stated by Grasso "The FAR and the Defense Federal Acquisition Regulation Supplement (DFARS) give DoD at least seven exceptions to use other than full and open competition in the awarding of contracts."¹⁸⁷ Two of them are important in Iraq for being justifications for uncompetitive contracts: (1) "unusual and compelling urgency," which means the United States would be seriously injured if agencies are not allowed to limit the number of providers, and (2) the use of open and full competition would put national security in danger.¹⁸⁸

These justifications were used extensively in Iraq. For example, according to Isenberg's study, between 2003 and 2007, the total cost of contracts with Blackwater was \$1.059 billion. But only \$48 million of that amount was won in competition with other PMCs.¹⁸⁹ Another example is the LOGCAP III contract, which was awarded to KBR in April 2006. It was worth \$16.4 billion.¹⁹⁰ According to Waxman, the LOGCAP III contract lacked price competition. Waxman stated that "LOGCAP III is an Indefinite Delivery/Indefinite Quantity (IDIQ) contract, which means that the total amount of work and specific projects to be completed were unknown at the time of the bid and award. When an IDIQ contract is put out to bid, there is no real opportunity for price competition because the projects under the contract have yet to be defined."¹⁹¹ Waxman also criticizes

¹⁸⁵ Federal Acquisition Regulation, "Full and open Competition," Subpart 6.1, available at https://www.acquisition.gov/far/current/html/Subpart%206_1.html (accessed December 7, 2009).

¹⁸⁶ Federal Acquisition Regulation, "Full and Open Competition After Exclusion of Sources" Subpart 6.2, available at https://www.acquisition.gov/far/current/html/Subpart%206_2.html (accessed December 7, 2009).

¹⁸⁷ Grasso, "Defense Logistical Support Contracts in Iraq and Afghanistan: Issues for Congress," 11. Also see, Federal Acquisition Regulation, "Other than Full And Open Competition," Subpart 6.3, available at https://www.acquisition.gov/comp/far/05-23-1/html/Subpart%206_3.html (accessed December 7, 2009).

¹⁸⁸ Federal Acquisition Regulation, "Other than Full And Open Competition," Subpart 6.3, available at https://www.acquisition.gov/comp/far/05-23-1/html/Subpart%206_3.html (accessed December 7, 2009).

¹⁸⁹ Isenberg, *Shadow Force: Private Security Contractors in Iraq*, 20–21.

¹⁹⁰ Henry Waxman, Letter to Donald Rumsfeld, House of Representatives, 109th Congress, July 5, 2006, 1.

¹⁹¹ *Ibid.*

the LOGCAP IV contract due to limitations on price competition for specific task orders even though it was awarded three contractors. According to the report, contracts should be awarded to as many as ten contractors to provide an effective price competition for task orders.¹⁹² Moreover, the Waxman states that for the LOGCAP IV contract “the Army staff explained that in the initial competition for the execution contract, contractors will not be asked to compete on the basis of price. The contractors will be asked to submit a cost proposal for a hypothetical task under the contract, but they will not be bound by the hypothetical submission and will not be required to compete against each other on the basis of the fees they will charge.¹⁹³” These examples of uncompetitive contracts indicate that “full and open competition” has become an exception in Iraq.

The last problem of the selection and contracting phase is related to contract types. Contracts are generally classified in two broad categories: fixed-price contracts and cost-reimbursement contracts.¹⁹⁴ Fixed-price contracts are usually used “when the risk involved is minimal or can be predicted with an acceptable degree of certainty.”¹⁹⁵ In Federal Acquisition Regulations, it is stated that “A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor’s cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties.”¹⁹⁶

In contrast, cost-reimbursement type contracts are suitable “when uncertainties involved in contract performance do not permit costs to be estimated with

¹⁹² Waxman, Letter to Donald Rumsfeld, House of Representatives, 109th Congress, July 5, 2006, 1.

¹⁹³ Ibid., 3.

¹⁹⁴ Federal Acquisition Regulation, “Selecting Contract Types,” Subpart 16.1, available from https://www.acquisition.gov/far/current/html/Subpart%2016_1.html#wp1085496 (accessed November 15, 2009).

¹⁹⁵ Ibid.

¹⁹⁶ Federal Acquisition Regulation, “Fixed-Price Contracts,” Subpart 16.2, available from https://www.acquisition.gov/comp/far/current/html/Subpart%2016_2.html (accessed November 15, 2009).

sufficient accuracy to use any type of fixed-price contract.”¹⁹⁷ Because of high level of uncertainties in the environment that PMCs function, their contracts are often cost-reimbursement contracts. For example, according to a Government Accountability Office (GAO) report, in Iraq, the U.S. government has primarily used cost-reimbursement type contracts in which the government has agreed to reimburse the companies for “all reasonable and allowable costs incurred in performing the work.”¹⁹⁸ Cost-reimbursement contracts include: cost contracts, cost-sharing contracts, cost-plus-incentive-fee contracts, cost-plus-award fee contracts and cost-plus fixed fee contracts.¹⁹⁹ According to Grasso, in 2005, the U.S. government spent \$110 billion dollars for cost-plus contracts of which nearly half (\$52 billion) were cost-plus-award-fee contracts.²⁰⁰ In these contracts, the private contractors’ fees increase with contract costs. As stated by Grasso, “Increased costs means increased fees to contractors. There is no incentive for the contractor to limit the government’s costs.”²⁰¹ With regard to this point, Schreier and Caparini argue that “the contractor’s profit is a percentage of their costs, thus giving them an incentive to keep those costs high – which is hardly a recipe for efficiency or rigor.”²⁰²

PMCs usually use the overhead costs to make the total costs much higher, and thus get higher fees. For example, in Iraq, the overhead costs of some PMCs’ contracts ranged from 11 to 55 percent of total costs.²⁰³ According to Grasso, the government paid \$66.1 million dollars to KBR for a project in which the administrative

¹⁹⁷ Federal Acquisition Regulation, “Cost-reimbursement Contracts,” Subpart 16.3, available from <https://www.acquisition.gov/far/fac/fac2005-15LL.pdf> (accessed November 15, 2009).

¹⁹⁸ Government Accountability Office, “Rebuilding Iraq: Fiscal Year 2003 Contract Award Procedures and Management Challenges,” report to Congressional Committees, GAO-04-605, June 2004, 24.

¹⁹⁹ Federal Acquisition Regulation, “Cost-reimbursement Contracts,” Subpart 16.3.

²⁰⁰ Grasso, “Defense Logistical Support Contracts in Iraq and Afghanistan: Issues for Congress,” 19.

²⁰¹ Ibid.

²⁰² Schreier and Caparini, “Privatizing Security: Law, Practice and Governance of Private Military and Security Companies,” 52.

²⁰³ Grasso, “Defense Logistical Support Contracts in Iraq and Afghanistan: Issues for Congress,” 20.

costs totaled about \$52.7 million. Moreover, for another five contracts with KBR, the government was billed \$62 million for administrative costs, while the direct construction expenses were about \$26.7 million.²⁰⁴

Subcontracting is another way of increasing costs. For example, in one case, Blackwater guarded the food trucks of a Kuwaiti company. It added overhead costs and a 36 percent markup to its bill and then sent the bill the Kuwaiti company. The Kuwaiti company then added its overhead costs and profits to the bill and sent it to a food company. The food company did the same thing and forwarded the bill to KBR. Then KBR sent the total costs fees to the U.S. government.²⁰⁵ Thus, KBR could get higher fees as a result of subcontracting.

In sum, there are three main problems in this phase: insufficient selection standards, uncompetitive contracting and cost-reimbursement contracts. These problems cause poor quality military services and waste taxpayers' dollars.

c. Operation in Theatre

The most problematic phase is the implementation of the tasks. The main problem is the legal vacuum in which PMCs have been operating in Iraq. PMCs and their employees, who are operating in Iraq, are not accountable to any legal institutions.

Because of the absence of effective international law (discussed in the third chapter) to regulate PMCs, national laws must be examined. The first option is the local law under which PMCs operate. In Iraq, this had not been a realistic possibility until the effective date of the Withdrawal Agreement, which was January 01, 2009.²⁰⁶ With regard to the Iraqi Laws regulating the PMCs, there was only Coalitional Provisional Authority (CPA) Order Number 17 that had not been rescinded or superseded by the Iraqi government. According to CPA Order No. 17, "...Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their

²⁰⁴ Grasso, "Defense Logistical Support Contracts in Iraq and Afghanistan: Issues for Congress," 20.

²⁰⁵ Ibid.

²⁰⁶ Elsea, "Private Security Contractors in Iraq and Afghanistan: Legal Issues," 12.

Contracts....”²⁰⁷ Also, it states that “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”²⁰⁸ As stated by Elsea, Schwartz and Nakamura, Iraqi authorities could start legal action against contractors due to their unlawful actions.²⁰⁹ However, Order 17 states that “Certification by the Sending State that its Contractor acted pursuant to the terms and conditions of the Contract shall, in any Iraqi legal process, be conclusive evidence of the facts so certified.”²¹⁰ In other words, Iraqi authorities could not take any legal action against contractors without the consent of the sending states. However, in no case did any sending states declare their consent for legal action against their contractors by Iraqi authorities. The alleged reason behind this immunity from Iraqi laws was the insufficiency of the Iraqi jurisdiction (such as due process). But if this is the case, there should be other alternatives to make a legal case possible against contractors. In theory, the alternatives are the national laws of the sending states. For this reason, we have to examine the national laws of the United States.

(1) Special Maritime and Territorial Jurisdiction (SMTJ): As mentioned by Elsea, Schwartz and Nakamura, “jurisdiction of certain federal statutes extends to U.S. nationals at U.S. facilities overseas that qualify as part of the special maritime and territorial jurisdiction (SMTJ) of the United States.”²¹¹ These criminal statutes, which apply in the SMTJ include maiming, assault, kidnapping, sexual abuse, assault or contact, murder and manslaughter.²¹² For example, “a CIA contractor was convicted under this provision in 2007 for the assault of a detainee in Afghanistan.”²¹³ Moreover, according to a CBO paper, “the U.S. has asserted jurisdiction over crimes

²⁰⁷ Coalition Provincial Authority Order Number 17, “Status of the Coalition Provincial Authority, MNF-Iraq, Certain Missions and Personnel in Iraq,” revised on June 17, 2004, 5.

²⁰⁸ Ibid.

²⁰⁹ Elsea, Schwartz and Nakamura, “Private Security Contractors in Iraq: Background, Legal Status and Other Issues,” 19.

²¹⁰ Coalition Provincial Authority Order Number 17, 5.

²¹¹ Elsea, Schwartz and Nakamura, “Private Security Contractors in Iraq: Background, Legal Status and Other Issues,” 21.

²¹² Ibid.

²¹³ Ibid., 22.

committed against U.S. property or personnel, regardless of where the crimes occur.”²¹⁴ Nevertheless, the crimes committed by contractors against Iraqis and their property are out of this provision. Also, it does not cover third country nationalities, which consist of 40 percent of all the contractors in Iraq. Furthermore, according to a GAO report, people who are already subject to MEJA are not subject to SMTJ.²¹⁵

(2) Extraterritorial Jurisdiction: Citing Elsea, Schwartz and Nakamura, “many federal statutes prescribe criminal sanctions for offenses committed by or against U.S. nationals overseas, including War Crimes Act of 1996.”²¹⁶ But they also state that crimes involving only foreign nationals may fall outside the jurisdiction of the U.S. courts.²¹⁷ Moreover, in other cases in which a foreign national is the perpetrator and the victim is a U.S. national, the jurisdiction of U.S courts applies to foreign nationals only if they are found in the United States.²¹⁸

(3) Military Extraterritorial Jurisdiction Act (MEJA): Military Extraterritorial Jurisdiction Act (MEJA) is an option for prosecuting private contractors who commit crimes abroad. In section 2, chapter 212 says that:

- (a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—
 - (1) while employed by or accompanying the Armed Forces outside the United States...²¹⁹

²¹⁴ Congressional Budget Office, “Contractors’ Support of U.S. Operations in Iraq,” 24.

²¹⁵ Government Accountability Office, “Rebuilding Iraq: DoD and State Department Have Improved Oversight and Coordination of Private Security Contractors in Iraq, but Further Actions are Needed to Sustain Improvements,” report to Congressional Committees, GAO-08-966, July 2008 (revised on August 1, 2008), 25.

²¹⁶ Elsea, Schwartz and Nakamura, “Private Security Contractors in Iraq: Background, Legal Status and Other Issues,” 22.

²¹⁷ Ibid., 23.

²¹⁸ Ibid., 22.

²¹⁹ Military Extraterritorial Jurisdiction Act, Sec.2, Chapter 212, <http://www.pubklaw.com/hi/pl106-523.pdf> (accessed February 27, 2009).

According to the GAO report (July 2008), until 2004, MEJA was only applicable to DoD contractors and subcontractors. In other words, the contractors and subcontractors of agencies other than DoD, such as the State Department and the United States Agency and International Development (USAID), were outside the scope of MEJA. With an amendment from the beginning of 2004, it also covers “any other U.S. agency to the extent that the contractor employee’s employment relates to supporting the mission of the DoD overseas.”²²⁰ But it still does not cover the contractors (whose employment does not relate to DoD’s missions) that are outside of the definition. Moreover, it does not cover contractors who are nationals of a territorial state or residing there ordinarily.²²¹

(4) Uniform Code of Military Justice (UCMJ): Uniform Code of Military Justice is another option for regulating private contractors. In article 2, it says that:

(a) the following persons are subject to this chapter:

... (10) In time of war, persons serving with or accompanying an armed force in the field...²²²

Until the amendment by “the John Warner National STAT.²⁵⁴ Defense Authorization Act for Fiscal Year 2007,” UCMJ was not applicable to any contractors because there had been no declaration of war by Congress. But it has amended UCMJ’s article 2(a) to read “in time of declared war or a contingency operation.”²²³ It extends military jurisdiction in contingency operations (such as Iraq) to “persons serving with or accompanying an armed force in the field.” However, according a GAO report (July 2008), there are some challenges of application of UCMJ to DoD

²²⁰ Government Accountability Office, “Rebuilding Iraq: DoD and State Department Have Improved Oversight and Coordination of Private Security Contractors in Iraq, but Further Actions are Needed to Sustain Improvements,” 26.

²²¹ Elsea, “Private Security Contractors in Iraq and Afghanistan: Legal Issues,” 21.

²²² Uniform Code of Military Justice, Article 2, <http://www.au.af.mil/au/awc/awcgate/ucmj.htm> (accessed February 27, 2009).

²²³ Secretary of Defense “Memorandum for Secretaries of The Military Departments Chairman of the Joint Chiefs of Staff under Secret Aries of Defense Commanders of the Combatant Commands” March 10, 2008, 2 <http://www.usdoj.gov/criminal/dss/docs/03-10-08dod-ucmj.pdf> (accessed August 2, 2009).

civilians such as “variations between the rules of courts-martial and civilian trials on key issues such as jury composition and due process.”²²⁴

Even though there are options to try private contractors for their unlawful actions abroad, they are not sufficient and there are “big holes.” For example, as stated by Isenberg, because of legal doctrine (government contractor), a contractor may not be sued in American courts if his treatment was deemed part of the U.S. government’s operations.²²⁵ Moreover, there are a number of examples showing that private contractors were not prosecuted for their unlawful actions. For example, Andrew J. Moonen who was a contractor for Blackwater, allegedly killed an Iraqi guard of Iraqi Vice President, Adel Abdul Mahdi. After the case, the U.S. Embassy and Blackwater shipped him out of Iraq immediately. No legal action was started against him. Moreover, two months later he was employed by another PMC in Kuwait, which was operating under a DoD contract.²²⁶ Singer points to another example that shows the immunity of contractors. He states, “The U.S. Army found that contractors were involved in 36% of the proven abuse incidents and identified 6 PMF employees in particular that were culpable in the abuses. However, not one of these individuals has yet been indicted, prosecuted, or punished. This is despite the fact that the U.S. Army has found the time to do so for the enlisted soldiers involved.”²²⁷

The immunity of private military contractors put the reputation of the U.S. as an advocate of human rights in danger. The United States is seen as responsible as the contractors for unlawful incidents in Iraq by the international community. Moreover, it harms the overarching objective of the United States, which is to establish a self-governing democratic Iraq, because the unlawful behaviors of contractors increase the hostility against Americans and their functions among the Iraqi public. The statement of an Iraqi security official in the Ministry of Interior confirms this

²²⁴ Government Accountability Office, “Rebuilding Iraq: DoD and State Department Have Improved Oversight and Coordination of Private Security Contractors in Iraq, but Further Actions are Needed to Sustain Improvements,” 28.

²²⁵ Isenberg, “A Government in Search of Cover: PMCs in Iraq,” 20.

²²⁶ Fainaru, *Big Boy Rules: America’s Mercenaries Fighting in Iraq*, 167.

²²⁷ Singer, “The Private Military Industry and Iraq: What Have We Learned and Where to Next?” 13.

conclusion. He argued that “They are part of the reason for all the hatred that is directed at Americans, because people don’t know them as Blackwater, they know them only as Americans.”²²⁸

Besides immunity from laws, another problem in this phase is the effectiveness of PMCs: are they really effective in implementing the tasks which are stated in their contracts? What are the standards of measuring the effectiveness? In fact, defining standards to measure the effectiveness of a military activity is difficult because of the uncertain nature of the environment. For example, the level of danger cannot be foreseen at the time of contracting. Even though it is difficult to define the standards, there are some indications of the ineffectiveness of some companies. As stated by Avant, “There is nothing compelling contractors to remain on the battlefield once bullets begin to fly.”²²⁹ For example, “there were periodic reports that supply was inadequate, both during the conflict and particularly as the insurgency accelerated in spring/summer 2003, because civilian contractors failed to show up.”²³⁰ Moreover, Avant adds, when a task is contracted out, PMCs have a tendency to use fewer personnel than the military. For example, a PMC assigned 26 personnel to guard a U.S. base that had been protected before by more than 150 military personnel.²³¹ The question is whether the company gave the U.S. government what it wanted. The response is controversial and it cannot be clear until the base is attacked. Until such time, PMCs will continue to claim that they are effective. Also, PMCs are not in the military chain of command and commanders of U.S. forces cannot order them to do something out of their contracts. But, as stated above, the unpredictable nature of armed conflict may change the requirements. At this point, PMCs are ineffective to answer the changing situations.

Thus, the ineffectiveness and unreliability of PMCs affects the functions of the military that are significantly dependent on them. For example, when a

²²⁸ Fainaru, *Big Boy Rules: America’s Mercenaries Fighting in Iraq*, 140.

²²⁹ Avant, “The Privatization of Security: Lessons from Iraq,” 336.

²³⁰ Ibid.

²³¹ Ibid., 334.

PMC fails to supply the military or to protect a military base or a supply convoy, the most important consequences will be to the military itself.

d. Oversight

Oversight is a continuing function that should start at the selection and contracting phase. Oversight mechanisms are indispensable elements of a principal-agency relationship to ensure that agencies are not shirking. There are two main purposes of an oversight function. The first one is to compensate the government's losses due to agencies' wrongdoings by punishing agencies for their actions. The second, and more important one, is the deterrent effect on agencies. Having capable oversight mechanisms signals agencies that oversight institutions have the capability to find the wrongdoing agencies and that shirking has important consequences for them.

Oversight functions can be classified as three types: oversight on contracting, oversight during implementation and oversight on completed contracts. The United States has institutions that implement all types of oversight in order to establish control, effectiveness and efficiency. However, in practice there are problems.

Congressional oversight is the most important institution that should function in all three types of oversight. However, in the realm of PMCs, congressional oversight is almost absent. Congressional oversight in the contracting process also includes oversight on the decisions of the executive branch for outsourcing. The executive branch uses leeway in laws. As Newell and Sheehy state, under the ITAR licensing system "Congress does not need to be informed of a contract in advance of the issuance of a related license unless the contract is valued at over \$50 million."²³² According to Caparini, to avoid the requirement for notification of Congress, the contracts over \$50 million can be separated into multiple components.²³³ She also states that, even when Congressional notification is required, it is very difficult to block a

²³² Newell and Sheehy, "Corporate Militaries and States: Actors, Interactions, and Reactions," 94.

²³³ Marina Caparini, "Domestic Regulation: Licensing Regimes for the Export of Military Goods and Services," in *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, ed. Simon Chesterman and Chia Lehnardt, (New York: Oxford University Press, 2007), 164.

defense contract due to a 30- day time limit.²³⁴ Because of the absence of congressional oversight, Avant and Sigelman argue that PMCs impeded public consent²³⁵ and they add that “The US Congress has less information about and control over the use of contractors than the use of troops,” which means that the executive branch can rely on contractors to eliminate congressional (and by extension, public) opposition.²³⁶ The lack of congressional oversight also means that the contracts with PMCs are not transparent, an important requirement of democracy besides public consent. The dialogue, in a hearing on the Fallujah Incidents, indicates the degree of non-transparency in PMCs contracts.

At the February 7 hearing, Andrew Howell asserted that incident reports about the Fallujah incident were classified by the government and thus not available for release to the Committee [Committee on Oversight and Government Reform]:

MR. HOWELL: Sir, some of the facts of that day were classified by the government and we are not permitted to discuss those.

REP. WELCH: Well, let me ask you this. This committee has requested copies of that report or reports, correct?

MR. HOWELL: Yes, sir.

REP. WELCH: Will you turn over to this committee those reports?

MR. HOWELL: Sir, we cannot turn over classified information. It would be a criminal act.²³⁷

Oversight during the implementation of tasks also has some weaknesses. In Iraq, this type of oversight function is implemented by government agencies and in some cases by other contractors as well. There are two types of oversight functions by the government on contract implementation: a) day to day oversight by Contracting Officer

²³⁴ Marina Caparini, “Domestic Regulation: Licensing Regimes for the Export of Military Goods and Services,” in *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, ed. Simon Chesterman and Chia Lehnardt, (New York: Oxford University Press, 2007), 164.

²³⁵ Deborah Avant and Lee Sigelman, “*What Does Private Security in Iraq Mean for US Democracy?*” 28.

²³⁶ *Ibid.*, 38.

²³⁷ Committee on Oversight and Government Reform, “Private Military Contractors in Iraq: An Examination of Blackwater’s Actions in Fallujah,” prepared for Chairman Henry A. Waxman, September 2007, 6, available at <http://www.c-span.org/pdf/blackwater100207.pdf> (accessed June 17, 2009).

Representatives (CORs), and b) periodic inspections by Defense Contract Management Agency (DCMA) Quality Assurance Representatives. According to a SIGIR report, “Generally, the CORs’ experience and training was limited, and their time available to devote to their oversight responsibilities insufficient. As a result, their abilities to perform their oversight responsibilities were hampered.”²³⁸ The report states that even though DCMA Quality Assurance Representatives’ inspections can provide oversight, they are not substitutes for CORs’ day-to-day oversight activities.²³⁹ Moreover, as stated by a DCMA representative about CORs in Iraq “where military units have already moved out and left critical shortages in CORs overseeing remaining contractors in that area.”²⁴⁰

Moreover, in Iraq, oversight functions over some reconstruction contracts were outsourced to other contractors. Even though this has not often been an issue for contracts of military functions, outsourcing the oversight functions of the LOGCAP IV contract to another private company was considered.²⁴¹ As stated in a report of the Committee on Government Reform, the main problem of this concept is inorganic links between private companies.²⁴² In other words, companies who are responsible for overseeing another company may have pre-existing relationships with them under other contracts.

For example, CH2M Hill was hired to oversee the reconstruction activities of Washington Group International at the same time that CH2M Hill and Washington Group International were "integrated partners" on a large Department of Energy contract in the United States. Similarly, Parsons and another company were charged with overseeing the activities of Fluor even though Parsons and Fluor were partners in a \$2.6 billion joint venture to develop oil fields in Kazakhstan.²⁴³

²³⁸ Special Inspector General for Iraq Reconstruction, “Need to Enhance Oversight of Theater-Wide Internal Security Services Contracts,” SIGIR-09-017, April 24, 2009, 10.

²³⁹ Ibid.

²⁴⁰ Commission on Wartime Contracting in Iraq and Afghanistan, “At What Cost? Contingency Contracting in Iraq and Afghanistan,” Interim Report, June 2009, 10.

²⁴¹ Committee on Government Reform, A Report to Donald Rumsfeld about the LOGCAP IV Contract, 3.

²⁴² Ibid., 4.

²⁴³ Ibid. Also see, United States Senate Democratic Policy Committee, “Contractors Overseeing Contractors: Conflicts of Interest Undermine Accountability in Iraq,” May 18, 2004, 3–5.

This lack of transparency and effective oversight makes it virtually impossible for the public to assess the practice of private military contracting and harms democratic values. Moreover, the absence or insufficiency of oversight functions waste taxpayers' dollars and make effectiveness and efficiency difficult.

However, there is a positive side with regard to oversight functions of the U.S. Institutions such as SIGIR, CRS and GAO provide huge amounts of information to Congress and the executive branch. Even though the information provided by these institutions is important, they do not perform continuing oversight functions on contracts that can keep PMCs from shirking.

2. The Effects on Iraq

The challenges of PMCs for Iraq are different from the challenges for the U.S. As discussed mainly in the third chapter, the reason for this is that Iraq is an infant democracy and does not have strong government institutions and armed forces. In other words, it is a weak state. Unlike the U.S., the theatre in which PMCs are operating is Iraq's own soil.

The Iraqi Government has not been in a position to decide whether PMCs should be used or not. PMCs have been used by Coalition Forces, especially the U.S. without the consent of the Iraqi government. Thus, the incentives for Iraq's use of PMCs cannot provide insight to the issue. However, after the withdrawal of the U.S. troops, the Iraqi government will be in a position to decide whether PMCs should be used or not. But the possible incentives for Iraq are not the same as U.S. incentives, which are stated above. Neither political pressures, monetary reasons, nor the flexibility of PMCs will have much effect on the Iraqis' decision. They will have more important factors to consider, which are directly linked with the survival of a democratic Iraq, including sovereignty, the capability of state institutions and the armed forces, ethnic violence and the overall security situation.

The management of the use of force is an important element of sovereignty. As stated in the second chapter, it also has another function that a state needs: the protection of its own citizens. When we look at the period between 2003 and today, the Iraqi

government has not had control over the management of the use of force and it has not been capable of protecting its citizens. With respect to PMCs, the picture of Iraq in this period is one of thousands of armed foreign nationalities walking around, some of them killing Iraqis without reason. The Iraqi government cannot do anything to protect its citizens or punish the perpetrators of crimes. For example, the case of five Blackwater contractors who killed 17 Iraqi civilians in an “indiscriminate” shooting in Baghdad “quickly came to be viewed as a test of the sovereignty of the newly founded Maliki government and of its ability to stand up to the Bush administration.”²⁴⁴ The result was the long delay for trial of five contractors until the beginning of 2010.²⁴⁵ Finally, the federal judge dismissed all charges against the five contractors on December 31, 2009.²⁴⁶ Moreover, there are many examples of incidents after which there was not even an investigation. Not surprisingly, the Maliki Government could not pass the test. Thus, the effectiveness of the government of Iraq (GoI) for providing security, in the eyes of the Iraqi public, is not high. According to a report that was submitted to the Congress, “When asked in August 2009 if they believed the GoI was effective at maintaining security, 49% of Iraqis said the GoI was effective....”²⁴⁷ Unless the Iraqi Government passes new legislation which cover PMCs and their employees, including foreign nationals, the lack of sovereignty will continue.

Moreover, after the withdrawal of the U.S. troops, sovereignty will continue to be a concern for the Iraqi government. This withdrawal does not mean that a stable security environment has been established in Iraq. As will be discussed below, the number of

²⁴⁴ James Risen, “Blackwater Inquiry Blocked by State Dept., Official says,” *The New York Times*, September 26, 2007, available at http://www.nytimes.com/2007/09/26/washington/26contractor.html?_r=3 (December 3, 2009).

²⁴⁵ James Vicini, “US Judge Sets Trial in 2010 for Blackwater Guards,” *Reuters*, January 6, 2009, available at <http://www.reuters.com/article/idUSN06444976> (accessed December 3, 2009).

²⁴⁶ Ewen MacAskill, “US Court Dismisses Charges Against Blackwater Security Guards,” *The Guardian*, December 31, 2009, available at <http://www.guardian.co.uk/world/2009/dec/31/us-court-dismisses-blackwater-charges> (accessed January 15, 2010).

Also see <http://edition.cnn.com/2009/CRIME/12/31/iraq.blackwater.charges/index.html> (accessed January 15, 2010).

²⁴⁷ Department of Defense, “Measuring Stability and Security in Iraq,” Report to Congress in Accordance with the Department of Defense Supplemental Appropriations Act 2008, September 2009, 32, available at http://www.defense.gov/pubs/pdfs/9010_Report_to_Congress_Nov_09.pdf (accessed November 15, 2009).

PMCs in Iraq will likely increase. My argument is that the types of PMCs functions, the nationality of PMCs and their employees, and also the capability of institutions and armed forces will determine the degree of sovereignty in Iraq.

According to a GAO report, while an 8 percent decrease was seen in the number of contractors since May 2009, the number of armed private security contractors increased 23 percent in the third quarter of fiscal year 2009.²⁴⁸ According to Schwartz, between June 2008 and December 2009, while the total number of all contractors has decreased by 27 percent, the number of private security contractors increased by 38 percent.²⁴⁹ This means that the type of PMCs has changed from the end of the spear to the tip of the spear. It cannot be denied that operational services are imposing more of a threat on Iraq's sovereignty than any other type of PMCs functions. The need for armed services stems from the insufficiency of the Iraqi Security Forces (ISF) to provide security independently. Although the capability of ISF has developed to some degree, it is of insufficient quality and quantity. This should not be seen as a justification for hiring operational services, however, because outsourcing security services, in turn, becomes an obstacle in the way to the development of Iraqi Security Forces.

Moreover, most of the experienced PMCs and their individual contractors are from Western countries, mainly the U.S. This means that even though U.S. troops will withdraw from Iraq completely, the continuing presence of PMCs in Iraq will be perceived by Iraqis as a continuing presence of the U.S. in Iraq. This perception will harm the legitimacy of the Iraqi government and the ISF in the eyes of the Iraqi public. Moreover, the current legal framework cannot cover the foreign contractors. This argument does not mean, however, that local PMCs and Iraqi individuals should be hired for armed security services. They would also have negative consequences for Iraq. As mentioned by Max Singer in a conference, "Iraq is not a real nation. It was artificially created by the League of Nations less than a century ago when the Ottoman Empire was dismantled. So Iraqis don't have a sense of loyalty or attachment to the nation of Iraq;

²⁴⁸ Government Accountability Office, "Operation Iraqi Freedom: Preliminary Observations on DoD Planning for the Drawdown of U.S. Forces from Iraq," GAO- 10- 179, November 2, 2009, 10.

²⁴⁹ Schwartz, "Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis," 9.

they identify with their ethnic group – and their religion and tribe. Realistically there are three separate groups in the country of Iraq: Sunni Arabs (20%), Shiite Arabs (60%), and Kurds (20%). They care little for each other and the rivalry among them is the primary feature of the Iraqi political landscape.”²⁵⁰ As such, local PMCs create good opportunities for ethnic groups and tribes to be armed. Without effective institutions capable of controlling the PMI, allowing locally armed PMCs may be suicide for Iraq.

Furthermore, since 2003, the legitimacy of PMCs’ presence in Iraq has been based on weak assumptions. As stated by Steve Fainaru, the Ministry of Interior (MoI) and Ministry of Trade, which gave the PMCs a license to operate, were assumed as effective institutions. Also, associations, such as the Private Security Company Association of Iraq (PSCAI), were assumed to have “ensuring integrity, commitment and success for each and every merc.”²⁵¹ But the opposite was true. The government institutions of Iraq were not effective and could not operate independently. PSCAI, as stated by a British contractor, gave licenses to any paying company.²⁵² For now, despite some development in functions of state institutions such as Ministry of Interior (MoI) and Ministry of Defense (MoD), government institutions are not capable of handling the problems that PMCs (especially operational functions) impose on Iraq.

To this day, with respect to PMCs, Iraq has played a territorial role without having principal state or home state roles. This means that PMCs in Iraq are completely out of the control of the Iraqi government. In the future, especially when the withdrawal of the U.S. troops is completed, the Iraqi government may assume the other two roles, the principal and home state roles. But the threat to its sovereignty will continue. It cannot be denied that the Iraqi government will need PMCs, due to the insufficiency of the Iraqi Armed Forces. However, the type of military services, the nationality of PMCs and their

²⁵⁰ Max Singer, "Where is Iraq Going?" Presentation to BESA/Yeshiva Conf. September 14, 2009, 1, available at http://www.hudson.org/files/publications/NY_talk%20on_Iraq_Singer.pdf (accessed November 25, 2009).

²⁵¹ Fainaru, *Big Boy Rules: America's Mercenaries Fighting in Iraq*, 68.

²⁵² *Ibid.*, 71.

employees, as well as the sectarianism influence should be considered before deciding to outsource. Moreover, the capacity of government institutions and laws should be taken into consideration.

C. CONCLUSION

The extensive use of PMCs in Iraq has had important effects on the U.S. and Iraq. Although the total number of contractors has decreased recently, the number of contractors who perform operational services has increased. The challenges that the PMI imposes on the two states are not same. First of all, while the U.S. is a superpower that has strong armed forces and capable state institutions, Iraq is a new and weak democracy that does not have sufficient armed forces and institutions. The second difference is that PMCs have been operating on Iraq's soil and interacting with Iraqi civilians directly, while the U.S. homeland and its citizens are thousands of miles away from the theatre. Third, with regard to relations with PMCs, the U.S. has the roles of home state and principal state, which make the PMCs dependent on the U.S. In contrast, until today, Iraq has had only the territorial state role without having the other roles.

The main challenges for the U.S. in the use of PMCs abroad are:

- (1) A declining international reputation due to the immunity of private military contractors in Iraq.
- (2) Lack of clarity with respect to the definition of "Inherently Governmental Functions" and the non-transparent nature of private military contracts harm the legitimacy of outsourcing military functions and this, in turn, harms the values of democracy.
- (3) Wasting taxpayers' dollars due to non-competitive contracting and cost-reimbursement contracts and also due to insufficient oversight on contracts.
- (4) Negative effects on military functions due to the unreliability of PMCs.

As for Iraq, the main challenges are related to the survival of a democratic Iraq:

- (1) PMCs (especially operational functions) impose an important threat to the sovereignty of Iraq.
- (2) The use of PMCs will be an obstacle in the development progress of ISF.
- (3) Local PMCs may be a good opportunity for ethnic groups to be armed, this in turn, may create a security dilemma between the factions.

For these reasons, the question is what are the solutions for two countries? This question will be answered in the next chapter.

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V. OPTIONS FOR REGULATING PRIVATE MILITARY COMPANIES

In the literature, various options have been suggested for regulating PMCs. The British “Green Paper” published on February 12, 2002, is an important document that presents six options for regulating PMCs. These are: a ban on military activity abroad; a ban on recruitment for military activity abroad; a licensing regime for military services; registration and notification; a general license for PMCs/PSCs; self regulation — through a voluntary code of conduct.²⁵³

According to Caroline Holmqvist, a licensing regime for military services “is likely to have both the greatest effectiveness and the widest purchase.”²⁵⁴ She also mentions the insufficiency of national regulations for three reasons; “a) the ability of PSCs to adapt in order to circumvent or evade legislation, b) the problem of extraterritorial enforcement, c) the lack of adequate mechanisms for oversight of companies abroad.”²⁵⁵ She also argues that “short of a global enforceable regime covering the activities of private security companies, regulation by and through regional organizations can offer wider scope and purchase than regulation at the national level alone.”²⁵⁶

Michael Cottier approaches the regulation issue in a different way. He classifies states as exporting states, territorial states and contracting states.²⁵⁷ Then he presents options that territorial and exporting states can use to regulate PMCs. He suggests, as

²⁵³ United Kingdom Foreign and Commonwealth Office, “Private Military Companies: Options for Regulation,” 22–26.

²⁵⁴ Holmqvist, “Private Security Companies: The Case for Regulation,” 53.

²⁵⁵ *Ibid.*, 54.

²⁵⁶ *Ibid.*, 55.

²⁵⁷ Michael Cottier, “Elements for Contracting and Regulating Private Military Companies,” *International Review of the Red Cross* 88, no. 863 (September 2006), 640.

well, some criteria for contracting states to select PMCs. His main argument is that there are two general options for territorial and exporting states: a) a ban on certain military services, b) a licensing system.²⁵⁸

According to Doug Brooks, PMCs are willing to accept strong national regulations and international humanitarian laws.²⁵⁹ He argues that regulation should not prevent flexibility and speed of the companies. He sees contracts as the best way to regulate PMCs by states.²⁶⁰

Virginia Newell and Benedict Sheehy argue that when PMCs are adequately defined, an effective national regulation can be established. They believe that a licensing system that includes the best characteristics of the U.S. and South Africa's current systems might be the best option.²⁶¹ Secondly, they argue that a licensing system "could be usefully supplemented by an independent industry association that develops codes of conduct and standardized training in areas such as international humanitarian law."²⁶² Finally, states in which the majority of PMCs are based (the United States, the United Kingdom, France and South Africa) should not wait for international regulation to regulate them nationally. They argue that such states must coordinate their efforts as a starting point for international regulation.²⁶³

The two extreme options—(1) a ban on PMCs' activities and (2) self regulation of industry—are both unrealistic and impracticable. To ban private military activities is almost impossible, because today they are so integrated into the operations of states domestically and internationally. Moreover, the industry has been somewhat self-regulated until today; however, the results are not promising. Thus, states should learn to live with PMCs but to regulate them as well. In this chapter, I will discuss the best options for states and the international community to regulate PMCs. Throughout the

²⁵⁸ Cottier, "Elements for Contracting and Regulating Private Military Companies," 646–653.

²⁵⁹ Brooks, "Protecting People: the PMC Potential," 4.

²⁶⁰ Ibid.

²⁶¹ Newell and Sheehy, "Corporate Militaries and States: Actors, Interactions, and Reactions," 100.

²⁶² Ibid.

²⁶³ Ibid., 100–101.

chapter, the United States, as a strong state and Iraq as a weak state, will be the primary cases of my argument. I will explain my argument in two main sections: national regulation and international regulation.

A. NATIONAL REGULATION

As advocated by Newell and Sheehy, a registration and licensing system can be an effective model for all states in the regulation of PMCs. In this system, PMCs will be under a continuing control regime. In the beginning, PMCs will be required to register with the government for specific functions (i.e., armed security services or logistical support) in order to legitimize their presence and operations. At this step, the background and the capability of the PMCs would be evaluated by the government to ensure that PMCs can implement the functions for which they have applied. Moreover, the background and skill checks of individual contractors of PMCs must be made continuously, starting with this step until the completion of the contracts. At the second step, PMCs would be required to have licenses for each contract with their home government or a foreign state. There would be several purposes for this step. First, is to control contracts as to whether they comply with national laws, international laws and also the territorial state laws where the PMCs will operate. Second, the contracts and the states or NGOs that are principals of the PMCs would be checked to ensure that the PMCs would not operate against the national interests of the home country. Third, contracts would be checked according to the registration terms of the PMCs. This would ensure that PMCs could not conduct functions for which they were not registered.

However, establishment of a registration and licensing system at the national level can provide only minimum control over PMCs. The system must be supplemented by national criminal laws, oversight and enforcement mechanisms in order to provide control, effectiveness and efficiency.

The system and supplementary factors that are stated above give a general guidance for states in the regulation of the PMCs. However, the priorities of states are different according to the challenges they face. Differences in priorities stem from three main areas. First, while the problems of strong states are mainly related to the use of

PMCs abroad, the main problems of weak states are related to the internal use of PMCs. Second, while strong states have the capacity and need political will to implement regulatory requirements, weak states have to implement restrictions on the use of PMCs. Third, most of the big and capable PMCs are based in strong states.

1. The United States as a Strong State

Even though the United States hires PMCs for protective services that sometimes resemble operational military functions because of the high level of danger, it does not outsource operational military functions directly. However, as mentioned in the fourth chapter, it is not clear in the definition of inherently governmental functions which military functions should be outsourced. Thus, the first step for the United States is to solve this. I have to assume that this lack of clarity will continue or the possible definition will exclude armed security services from the inherently governmental functions in order to generalize my argument for all strong states. In other words, I assume that armed security services would be outside of the potential definition of inherently governmental functions, thus PMCs will continue to perform these services.

The internal use of PMCs does not pose a big problem for the United States because it has strong national laws that cover PMCs and their employees, including foreign nationals. Moreover, the U.S. has all three state roles when PMCs are operating in the homeland. The main problem is related with the use and export of PMCs abroad. Unfortunately, as stated in the previous chapter, national laws, oversight mechanisms (congressional and executive) are not sufficient for that. The ineffectiveness of institutions over the external use of PMCs creates some important challenges even though they are not as extreme as for weak states. The negative international reputation of the U.S., the ineffectiveness of PMCs, and the waste of national resources are important consequences of unregulated PMCs for the U.S.

The first step in an effective registration system must be the classification of military and police functions. Dew and Hudgens' classification may be a model for the United States. Then, the next step must be defining the requirements for companies and individual contractors to be registered for specific military functions. Registration would

mean that the capacity and capability of a PMC for a specific function (i.e., armed static security) is approved by the government. Also, individual skill and background checks must be made, in detail, and individual employees must be required to register with the government for specific functions. The purpose of this is to prevent the inappropriate use of employees in areas other than their experience and skills.

Moreover, before a contracting process (contracts with the U.S. government or other states) PMCs must be required to have licenses for each contract. Here, the important point is that PMCs must be granted licenses for functions for which they have been registered. The purposes of a licensing system are to examine the contract for the national interests of the U.S., the final control of the capability of companies, and also to prevent the companies from operating in functions that they do not have capacity to implement. Furthermore, congressional oversight, which provides transparency and public consent, must be in effect over registration and licensing processes.

As for the implementation of functions, national laws must be extended to cover the activities of PMCs and their employees abroad. UCMJ and MEJA, with amendments, are the most promising even though their implementation over contractors has been seen only rarely. Moreover, criminal investigation mechanisms that can operate abroad must be established to collect information and bring cases to the courts.

Furthermore, open and fair competition must be provided among the PMCs to ensure that best quality is hired for best value. Also, the type of contracts must be price-fixed type contracts, which eliminate PMCs' incentives to keep costs higher. And, the contracts must be overseen on a daily basis to ensure that PMCs comply with the contract terms and national and international laws. Also, audits and other oversight activities by government and congressional agencies must be in effect throughout the contract period and afterwards.

At first glance, it seems that there are a lot of things to do. However, the United States has the capacity to do them, and we can see attempts in some areas. For example, the amendments in UCMJ and MEJA and the determination of the Obama administration over using price-fixed contracts indicate development in regulating PMCs.

As argued by Jennings, political will is the most important requirement of states, including the United States, for regulating PMCs.²⁶⁴ Today, the United States seems to have political will in some areas even though the possibility of success is open to discussion. For example, in a memorandum on March 4, 2009, President Obama announced his administration's priorities over contracting: "(1) increased competition; (2) use of fixed-price contracts; (3) ensuring that the acquisition workforce can manage and oversee contracts; and (4) ensuring that functions considered to be inherently governmental are not contracted out."²⁶⁵ Moreover, the 2010 Quadrennial Defense Review (QDR) report indicates a decrease in the number of contractors and a desire to give appropriate tasks to PMCs by stating that "Department [DoD] will reduce the number of support service contractors to their pre-2001 level of 26 percent of the workforce (from the current level of 39 percent) and replace them, if needed, with full-time government employees. These efforts will help establish a balanced total workforce of military, government civilians, and contractor personnel that more appropriately aligns public and private-sector functions, and results in better value for the taxpayer."²⁶⁶

In sum, my argument is that the United States has to establish a registration and licensing system specifically for the use and export of PMCs abroad. National laws must be extended to cover contractors who operate abroad and must be supported by effective oversight, investigation and enforcement mechanisms. Moreover, effective contracting elements such as fixed-price contracts, and open and fair competition should be provided. The capacity of the United States is sufficient to make all of these real. As stated above, the starting point is the willingness to regulate PMCs.

²⁶⁴ Kathleen M. Jennings, "Armed services: Regulating the Private Military Industry," New Security Program FAFO Report-532, 2006, 13.

²⁶⁵ John R. Luckey, Valerie Bailey Grasso, Kate M. Manuel, "Inherently Governmental Functions and Department of Defense Operations: Background, Issues and Options for Congress," 6.

²⁶⁶ Department of Defense, "Quadrennial Defense Review Report," February 2010, 55–56, available at <http://www.defense.gov/qdr/QDR%20as%20of%2026JAN10%200700.pdf> (accessed February 14, 2010).

2. Iraq as a Weak State

Iraq, as a new democratic state, has to handle the case of PMCs differently from the United States. The most important difference is that unlike the U.S., Iraq has to regulate PMCs specifically for internal use of them. The regulation of PMCs by the Iraqi Government requires more than just political will. Beyond political will, the Iraqi government has to develop its institutions to control and regulate PMCs. However, it is difficult to have effective institutions in the short term for Iraq as it is a weak state. Thus, the Iraqi government must seek to minimize the negative effects of PMCs that operate in its own territory.

First of all, due to an insufficient state capacity (weak institutions), Iraq must seek to limit the presence of PMCs, especially foreign PMCs, in Iraq. In particular, after the withdrawal of the United States, the first goal of the Iraqi government must be to limit the numbers of foreign PMCs operating in Iraq, because, as stated above, foreign PMCs impose an important threat to Iraq's sovereignty. There are two options for Iraq to limit the presence of foreign PMCs in Iraq: a complete ban of the functions of foreign PMCs in Iraq; and a fee or taxation system in which the amount can be changed according to the type of functions. The first option is not possible, because as mentioned above, the need for PMCs will be higher after the withdrawal of the U.S. troops, and because the numbers and capacities of local PMCs are insufficient by now. Thus, a fee or taxation system, as opposed to banning them, seems more feasible. Furthermore, a limit on individual non-Iraqi employees is also required in Iraq. Again, a defined fee for each non-Iraqi contractor can be an option for this purpose. A taxation system on foreign PMCs and foreign employees will have two positive results. First, potential clients of PMCs will tend to hire local PMCs because they can be controlled easier than foreign PMCs. Second PMCs, in turn, will tend to hire Iraqi contractors and this tendency will provide employment for Iraqis.

A type of taxation system can also be applied in order to limit the functions at the top of the spear. As stated in the previous chapter, the implementation of operational functions can be an obstacle for the development of the Iraqi Armed forces.

A background checking function for the registering and licensing system is more significant for Iraq than for the U.S. because local PMCs can be seen as an opportunity to be armed, by ethnic groups, and they can use PMCs for their group's interests. In order to prevent this potential danger, the establishment of an agency under MoI or MoD, with high intelligence capabilities and a skilled staff, is required.

Moreover, the Iraqi Government must legislate effective national laws that cover private military contractors, including foreign PMCs and their individuals. The registration and licensing system, fee or taxation system, and national laws for PMCs must be supplemented by oversight and enforcement mechanisms, which are indispensable elements of a principal-agent relationship.

In this explanation, it seems that while the United States' priorities are related to all three of the dimensions of civil-military relations, control, effectiveness and efficiency, Iraq's priorities are related to only control for now. Of course, Iraq has to deal with effectiveness and efficiency in the use of PMCs, but these should be long-term goals after the establishment of effective control over PMCs. The United States, on the other hand, has the capacity to implement all three dimensions in the short term. It just requires a strong political will.

B. INTERNATIONAL REGULATION

Due to the transnational nature of PMCs, without an international regulatory system, national regulations cannot be sufficient to regulate the private military industry as a whole. There are three main reasons for this argument. First, PMCs can change their location from one state to another when things go wrong for them or when national regulations restrict their behavior and profit. Moreover, PMCs can change their business name, as well as their locations, in order to escape responsibility. Second, even if PMCs are regulated in strong states nationally, weak states and their citizens may face danger because of the use of PMCs by strong states. Thus, weak states must be protected against the use of PMCs by strong states on their soil. Third, as seen in the case of Croatia, PMCs can function against the embargoes of the international community, which could create a

threat to international peace attempts. Therefore, the establishment of an international agency under an overarching command, such as the United Nations, is required in order to support national regulations.

Establishment of an international institution can be beneficial by implementing two functions. First, it can establish a registration requirement for PMCs to operate abroad. Registration with an international agency will give PMCs a more comprehensive legitimacy in the eyes of the international community. Besides registration, an international agency can make a blacklist of companies that would include previous corporations using different names, and their owners and administrators. This blacklist can work as guidance for states in their national registering and licensing systems. Moreover, non-governmental organizations can also use this blacklist for hiring security companies. Second, it can impose restrictions on states in the use of PMCs on foreign soils, especially in weak states, in order to prevent unintended consequences. The potential restrictions can be on the type of functions, the number of contractors, the nationality of contractors or the maximum period of military contracts.

Besides an international institution, an international law, which defines PMCs and their employees, and the juridical responsibilities of parties (territorial state, principal state and home state) is needed. Moreover, in case of some legal vacuums that emerge between the national laws of parties, and in case of extreme crimes against humanity, a comprehensive international jurisdiction, such as the International Criminal Court, must be in effect to try and punish those responsible. Furthermore, international law must establish corporate responsibility for PMCs and state responsibility for acts against criminal law and the use of PMCs within the international regulatory system. The main purpose of this is to increase internal control of PMCs and the effectiveness of national regulatory systems and laws by increasing the consequences of unlawful behaviors of PMCs for companies themselves, and their home states.

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VI. CONCLUSION

A. SUMMARY

PMCs are alternative security providers for states that must be considered from the aspect of CMR. However, most of the old theories of CMR do not cover PMCs because they deal just with the military. The control dimension is the only subject of old theories. Effectiveness and efficiency, which are presented as new dimensions of civil-military relations by Bruneau and Matei, are not the subject of old theories. Among CMR theories, the principal agent theory is the one most suitable to explain the structure and relationship of PMCs and states. In fact, it is more suitable for the PMCs' realm than the military. However, it is not sufficient to find solutions for the tensions in relations between PMCs and states due to its static nature. At this point, the importance of "new institutionalism" begins. In other words, my argument is that the solutions for the problems in PMCs regulation are related with national and international institutions.

PMCs are not a new phenomenon of this century. However, the most recent and the most extensive use of PMCs is in the Iraq War and its aftermath. Even though problems with the use of PMCs had been known before, they have been more visible to the international community since the beginning of the Iraq War. Moreover, the Iraq case is a perfect example in which two extreme types of states can be examined: the United States as a strong state and Iraq as a weak state. I classify states as weak or strong by looking at capabilities and institutions of states. In realm of PMCs, the incentives of states change according to the types of states. Strong states have four main incentives for using PMCs: PMCs are allegedly cheaper than public armed forces; they are flexible and rapidly deployable; they relieve the task burden of public forces; and they are good tools for escaping from the political pressure of the use of public forces. Thus, the incentives of strong states are related to effectiveness and efficiency and political reasons. In contrast, in most cases, PMCs are the only option for weak states in order to survive, because they do not have sufficient public forces and it is not easy to obtain rapid foreign assistance due to political reasons.

The problems imposed by PMCs are related to all three dimensions of civil military relations: control, effectiveness and efficiency. However, as in the case of incentives, the types and degrees of problems are not the same for the two types of states. There are three main reasons for this argument. First, most PMCs are based in strong states. Second, from the aspect of the principal-agent relationship, while strong states often have principal and home state roles, weak states usually have territorial state role without having complete control. In other words, PMCs are out of the control of weak states, even if they operate in their own territory. Finally, PMCs can harm the sovereignty of weak states due to insufficient institutions and national laws required to deter unlawful PMC actions. In contrast, homeland and citizens of strong states (such as the U.S.) are distant from the theater and their strong institutions and national laws are effective to protect their sovereignty.

As mentioned above, the case of Iraq includes two different types of states. Even though it is not clear which incentive is dominant over the others for the United States, it is obvious that the main purpose was to increase effectiveness and efficiency. However, it is not wrong to say that the United States has not yet reached its goal. First, the extensive use of PMCs caused waste of taxpayers' dollars due to insufficient contracting processes, oversight and enforcement mechanisms, which are indispensable elements of principal-agent relations. Second, the absence of congressional oversight and public consent for using PMCs has damaged democratic values. Finally, the extensive use of PMCs in Iraq damaged the U.S.' international reputation as an advocate of human rights and justice, due to the immunity it provided for PMCs. These are important challenges, but the United States has the capacity to overcome them all. It needs political will to do that. As for Iraq, the main problems are about the survival of new democratic Iraq. First, PMCs, especially those that are foreign, threaten the sovereignty of the Iraqi government. Second, the implementation of operational functions may damage the development efforts of the ISF. Finally, PMCs, especially the local ones, can be seen as legal opportunities to be armed by ethnic groups. Thus, Iraq needs more than just political will. Moreover, it is not easy for Iraq to deal with all the dimensions of civil-military relations

for PMCs. In the short term, the efforts of the Iraqi Government must be focused on the control dimension. And, the easiest way of doing this is to impose limitations on foreign PMCs and the operational functions of PMCs in Iraq.

B. RECOMMENDATIONS

In the literature about the regulation of PMCs, several options are proposed. Among them, two extreme ones—a complete ban and self-regulation—are impractical. PMCs are so integrated into the operations of states that states will suffer if they ban the activities of PMCs. Moreover, PMI is already self-regulated. If it has been working effectively, why are we talking about problems?

My argument is that a registration and licensing system can be beneficial for regulation at the national level. Moreover, the system must be supported by national laws. Furthermore, the national regulation is not sufficient, by itself, due to PMCs' transnational nature. An international regulation must be established to support national regulations. International regulation should be in two parts. First, an international institution, under an international organization such as the UN, should be established. This institution will function as a registering agency, which will prevent the movement of PMCs locations and also keep the blacklist of PMCs and their administrators. The second part is extension of international criminal law to cover PMCs and individual contractors. The responsibilities of states, when territorial states' national laws are ineffective, must be organized by international laws. Furthermore, the state must be responsible for the unlawful actions of PMCs and individual contractors who are not tried or prosecuted.

PMCs are important actors for states and the international community as a whole. If we must live with them, we also must learn to control them. Moreover, we should learn to promote them for international peace. For example, PMCs may be used under the command of the UN in peacekeeping operations, if they are regulated at both national and international levels. These expectations must wait until effective regulation at national and international levels are established. Otherwise, as the international community witnessed in Iraq, PMCs cause serious problems.

In sum, efforts at both levels (national and international) are required for an effective global regulation of PMI. Moreover, as stated by Avant, “Regulatory efforts, whether formally coordinated or not, are most likely to direct behavior in as stable way if they reflect common expectations and encourage similar behavior.”²⁶⁷ As argued by Avant after 2005 efforts of different actors such as the UN and the U.S. (as the most important and capable state for regulation) changed their stands towards a common and positive direction.²⁶⁸ This current trend in efforts is an indicator of success in near future.

²⁶⁷ Deborah Avant, “Governance Dynamics and Regulation in the Global Private Market,” Draft Paper, 3.

²⁶⁸ Ibid., 14.

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